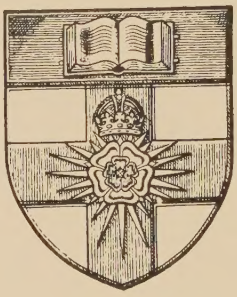
THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

UNIVERSITY OF LONDON LIBRARY

REFERENCE ONLY

IX. North Gallery.



UNIVERSITY OF LONDON
LIBRARY

Digitized by the Internet Archive
in 2026

https://archive.org/details/law-reports-chancery-division_1886_32

THE

# INCORPORATED COUNCIL OF LAW REPORTING

FOR

# ENGLAND AND WALES.

---

## Members of the Council.

*Chairman*—JOSEPH BROWN, Esq., Q.C.

### *EX-OFFICIO MEMBERS.*

| | |
|---|---|
| SIR RICHARD E. WEBSTER, Knt., M.P. . | ATTORNEY-GENERAL. |
| SIR EDWARD CLARKE, Knt., M.P. . . | SOLICITOR-GENERAL. |

### *ELECTED MEMBERS.*

| | |
|---|---|
| MR. SERJEANT PULLING | Serjeants' Inn. |
| ARTHUR KEKEWICH, Esq., Q.C.<br>JOHN RIGBY, Esq., Q.C. | Lincoln's Inn. |
| SIR JOHN BLOSSETT MAULE, Knt., Q.C.<br>ARTHUR CHARLES, Esq., Q.C. | Inner Temple. |
| JOSEPH BROWN, Esq., Q.C.<br>F. A. PHILBRICK, Esq. Q.C. | Middle Temple. |
| JOHN A. RUSSELL, Esq., Q.C.<br>WILLIAM CRACROFT FOOKS, Esq., Q.C. | Gray's Inn. |
| WILLIAM WILLIAMS, Esq. (Firm—Messrs. Currie, Williams, & Williams), Lincoln's Inn Fields<br>JOHN HOLLAMS, Esq. (Firm—Messrs. Hollams, Son, & Coward), Mincing Lane, E.C. | Incorporated Law Society. |

*Secretary*—JAMES THOMAS HOPWOOD, Esq., 10 Old Square, Lincoln's Inn.

THE

# LAW REPORTS.

Under the Superintendence and Control of the
INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES.

## Supreme Court of Judicature.

CASES DETERMINED IN THE

# CHANCERY DIVISION

AND IN

# LUNACY.

AND ON APPEAL THEREFROM IN THE

# COURT OF APPEAL.

EDITOR—G. W. HEMMING, Q.C.

REPORTERS.

| | | |
|---|---|---|
| Court of Appeal | H. CADMAN JONES, MARTIN WARE, F. G. A. WILLIAMS, W. WORSLEY KNOX, | *Barristers-at-Law.* |
| V.-C. Bacon | G. I. FOSTER COOKE, | *Barrister-at-Law.* |
| Mr. Justice Kay | T. F. MORSE, W. WORSLEY KNOX, | *Barristers-at-Law.* |
| Mr. Justice Chitty | F. G. A. WILLIAMS, GEORGE MURRAY, | *Barristers-at-Law.* |
| Mr. Justice North | CHARLES MARETT, H. L. FRASER, | *Barristers-at-Law.* |
| Mr. Justice Pearson | W. LLOYD CABELL, D. PITCAIRN, | *Barristers-at-Law.* |

VOL. XXXII.

1886.—XLIX. & L. VICTORIÆ.

LONDON:
Printed and Published for the Council of Law Reporting
BY WILLIAM CLOWES AND SONS, LIMITED,
DUKE STREET, STAMFORD STREET; AND 14, CHARING CROSS.
PUBLISHING OFFICE, 27, FLEET STREET, E.C.

1886.

BIBL. LONDIN UNIV.

| | |
|---|---|
| Lord Halsbury, | *Lord Chancellors.* |
| Lord Herschell, | |
| Lord Esher, | *Master of the Rolls.* |
| Sir Henry Cotton, | *Lords Justices of the Court of Appeal.* |
| Sir Nathaniel Lindley, | |
| Sir C. S. C. Bowen, | |
| Sir Edward Fry, | |
| Sir Henry C. Lopes, | |
| Sir James Bacon, | *Vice-Chancellor.* |
| Sir E. E. Kay, | *Justices of High Court, attached to Chancery Division.* |
| Sir J. W. Chitty, | |
| Sir Ford North, | |
| Sir John Pearson, | |
| Sir Richard E. Webster, | *Attorneys-General.* |
| Sir Charles Russell, | |
| Sir John Eldon Gorst, | *Solicitors-General.* |
| Sir Horace Davey, | |

## ERRATUM.

| *Page* | *Line* | |
|---|---|---|
| 202 | 1 | Add *Forbes*, Q.C., after *Hemming*, Q.C. |

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1886, will be as follows:—

In the First Series,
31 Ch. D.

In the Second Series,
16 Q. B. D. 11 P. D.

In the Third Series,
11 App. Cas.

---

# A TABLE

OF THE

# NAMES OF THE CASES REPORTED

IN THIS VOLUME.

---


A.

| | PAGE |
|---|---|
| Alford, *In re.* Hunt *v.* Parry – | 383 |
| Allingham, *In re* – – – | 36 |
| Anglo-African Steamship Company, *In re* – – – | 348 |
| Aylesford's (Earl of) Settled Estates, *In re* – – – | 162 |

B.

| | |
|---|---|
| Barnard, *In re.* Edwards *v.* Barnard – – – – | 447 |
| ———, Edwards *v.* *In re* Barnard – – – – | 447 |
| Bissett *v.* Jones – – – | 635 |
| Blake *v.* Gale – – – | 571 |
| Blakelock, Taylor *v.* – – | 560 |
| Bond *v.* Walford – – – | 238 |
| Bradshaw *v.* Warlow – – | 403 |
| Brisco, Morgan *v.* – – – | 192 |
| Briton Medical and General Life Assurance Association, *In re* – | 503 |
| Brown, *In re.* Dixon *v.* Brown | 597 |
| ———, Dixon *v.* *In re* Brown | 597 |
| Burroughs, Wellcome & Co.'s Trade-mark, *In re.* *In re* Wellcome's Trade-mark – | 213 |
| Busfield, *In re.* Whaley *v.* Busfield – – – – – | 123 |
| ———, Whaley *v.* *In re* Busfield – – – – – | 123 |
| Bygrave *v.* Metropolitan Board of Works – – – – | 147 |

C.

| | |
|---|---|
| Calmady, Freke *v.* *In re* Hotchkys – – – – – | 408 |
| Chamber Colliery Company *v.* Hopwood – – – – | 549 |
| Cheshire Banking Company, *In re.* Duff's Executors' Case – | 301 |
| Colling (a Person of Unsound Mind), *In re* – – – | 333 |
| Collins, *In re.* Collins *v.* Collins | 229 |
| ——— *v.* Collins. *In re* Collins | 229 |
| Commissioners of Sewers of the City of London, Lynch *v.* – | 72 |

PAGE

Concha, De Mora *v.* – – 133
Constable *v.* Constable – – 233
Cornwallis, *In re.* Cornwallis *v.* Wykeham-Martin – – 388
——— *v.* Wykeham-Martin. *In re* Cornwallis – – – 388
Croydon Rural Sanitary Authority, Wimbledon Local Board *v.* 421
Currey, *In re.* Gibson *v.* Way 361

D.

Davies *v.* Hodgson – – – 225
——— *v.* Wright – – – 220
Davis, Loring *v.* – – – 625
Dean, *In re.* Ward *v.* Holmes – 209
De Mora *v.* Concha – – – 133
Dixon *v.* Brown. *In re* Brown 597
Dovey, Swabey *v.* – – – 352
Duff's Executors' Case. *In re* Cheshire Banking Company 301
Dynevor (Lord) *v.* Tennant – 375

E.

Edison and Swan Electric Light Company *v.* Woodhouse – 520
Edwards *v.* Barnard. *In re* Barnard – – – – 447
Evans, Thurston *v.* *In re* Thurston – – – – – 508

F.

Field *v.* Lydall. *In re* Tillett – 639
Findlay (an Infant), *In re* 221, 641
Freke *v.* Calmady. *In re* Hotchkys – – – – – 408

G.

Gale, Blake *v.* – – – 571
General Horticultural Company, *In re.* *Ex parte* Whitehouse 512
Gibson *v.* Way. *In re* Currey 361
Gooch *v.* London Banking Association – – – – 41
Green *v.* Paterson – – – 95

H.

PAGE

Hall *v.* Heward – – – 430
Hargreaves & Thompson's Contract, *In re* – – – 454
Harrison, *In re.* Latimer *v.* Harrison – – – – 395
———, Latimer *v.* *In re* Harrison – – – – 395
Hendry *v.* Turner – – – 355
Heward, Hall *v.* – – – 430
Hoare *v.* Stephens – – – 194
Hodgson, Davies *v.* – – 225
Holmes, Ward *v.* *In re* Dean – 209
Hopwood, Chamber Colliery Company *v.* – – – 549
Hotchkys, *In re.* Freke *v.* Calmady – – – – 408
Hudson's Trade-marks, *In re* – 311
Hunt *v.* Parry. *In re* Alford – 383
Hutchings, Marshfield *v.* *In re* Marshfield – – – – 499

J.

James, Lewis *v.* – – – 326
Jenner-Fust *v.* Needham – – 582
Jones, Bissett *v.* – – – 635
——— *v.* Slee – – – – 585

K.

Kingdon, *In re.* Wilkins *v.* Pryer – – – – 604

L.

Lambert and Butler, Wood *v.* *In re* Wood's Trade-mark – 247
Langley, Mutual Life Assurance Society *v.* – – – – 460
Latimer *v.* Harrison. *In re* Harrison – – – – 395
Learoyd, Whiteley *v.* *In re* Whiteley – – – – 196
Lewis *v.* James – – – 326
London Banking Association, Gooch *v.* – – – – 41
Loring *v.* Davis – – – 625
Lydall, Field *v.* *In re* Tillett – 639
Lynch *v.* Commissioners of Sewers of the City of London 72
Lyndon's Trade-mark, *In re* – 109

M.

PAGE

MacDowall's Case. *In re* Oriental Bank Corporation – – 366
McRea, *In re*. Norden *v.* McRea 613
———, Norden *v.* *In re* McRae 613
Manchester, Sheffield, and Lincolnshire Railway Company, North Central Wagon Company *v.* – – – – 477
Marjoribanks, Marlborough (Duke of) *v.* *In re* Duke of Marlborough's Settlement – 1
Marlborough (Duke of) *v.* Marjoribanks. *In re* Duke of Marlborough's Settlement – 1
——————— *v.* Sartoris – – – – – 616
Marlborough's (Duke of) Settlement, *In re*. Duke of Marlborough *v.* Marjoribanks – 1
Marshfield, *In re*. Marshfield *v.* Hutchings – – – – 499
——— *v.* Hutchings. *In re* Marshfield – – – – 499
Martin *v.* Spicer – – – 592
Mason *v.* Westoby – – – 206
Masonic and General Life Assurance Company, *In re* – 373
Maude, Spiller *v.* – – 158, n.
Metropolitan Board of Works, Bygrave *v.* – – – – 147
Miles *v.* New Zealand Alford Estate Company – – – 266
Montagu *v.* Sandwich (Earl of) 525
Morgan *v.* Brisco – – – 192
Mutual Life Assurance Society *v.* Langley – – – – 460

N.

Needham, Jenner-Fust *v.* – 582
New Zealand Alford Estate Company, Miles *v.* – – – 266
Norden, McRea *v.* *In re* McRea 613
North Central Wagon Company *v.* Manchester, Sheffield, and Lincolnshire Railway Company – – – – – 477
North Staffordshire Railway Company, Williamson *v.* – 399
Noyes *v.* Pollock – – – 53

O.

PAGE

O'Donoghue *v.* Vowles. *In re* Vowles – – – – 243
Oriental Bank Corporation, *In re*. MacDowall's Case – 366

P.

Parry, Hunt *v.* *In re* Alford – 383
Paterson, Green *v.* – – – 95
Pattinson, Pease *v.* – – – 154
Pease *v.* Pattinson – – – 154
Pollock, Noyes *v.* – – – 53
Pryer, Wilkins *v.* *In re* Kingdon – – – – – 604

R.

Rice (a Person of Unsound Mind), *In re* – – – 35
Ruthin and Cerrig-y-Druidion Railway Act, *In re* – – 438

S.

Sandwich (Earl of), Montagu *v.* 525
Sartoris, Marlborough (Duke of) *v.* – – – – – 616
Scholes & Sons, *In re* – – 245
Slee, Jones *v.* – – – 585
Spicer, Martin *v.* – – – 592
Spiller *v.* Maude – – 158, n.
Stephens, Hoare *v.* – – – 194
Strong, *In re* – – – – 342
Swabey *v.* Dovey – –

T.

Taylor *v.* Blakelock – – 560
Tennant, Dynevor (Lord) *v.* – 375
Terry and White's Contract, *In re* – – – – – – 14
Thompson and Hargreaves' Contract, *In re* – – – 454
Thurston, *In re*. Thurston *v.* Evans – – – – 508
——— *v.* Evans. *In re* Thurston – – – – – 508
Tillett, *In re*. Field *v.* Lydall 639

| | PAGE |
|---|---|
| Tuer's Will Trusts, *In re*– – | 39 |
| Turner, Hendry *v.* – – – | 355 |

V.

| | |
|---|---|
| Vernon, Ewens & Co., *In re* – | 165 |
| Vowles, *In re.* O'Donoghue *v.* Vowles – – – – | 243 |
| ———, O'Donoghue *v.* *In re* Vowles – – – – | 243 |

W.

| | |
|---|---|
| Walford, Bond *v.* – – – | 238 |
| Ward *v.* Holmes. *In re* Dean – | 209 |
| ——— *v.* Wood. *In re* Wood – | 517 |
| Warlow, Bradshaw *v.* – – | 403 |
| Way, Gibson *v.* *In re* Currey – | 361 |
| Wellcome's Trade-mark, *In re.* *In re* Burroughs, Wellcome & Co.'s Trade-mark – – | 213 |
| Westoby, Mason *v.* – – – | 206 |
| Whaley *v.* Busfield. *In re* Busfield – – – – – | 123 |
| White and Terry's Contract, *In re* – – – – – | 14 |
| Whitehouse, *Ex parte.* *In re* General Horticultural Company – – – – – | 512 |
| Whiteley, *In re.* Whiteley *v.* Learoyd – – – – | 196 |
| ——— *v.* Learoyd. *In re* Whiteley – – – – | 196 |
| Whitley Partners, Limited, *In re* – – – – – | 337 |
| Wilkins *v.* Pryer. *In re* Kingdon – – – – – | 604 |
| Williamson *v.* North Staffordshire Railway Company – | 399 |
| Wimbledon Local Board *v.* Croydon Rural Sanitary Authority | 421 |
| Wood, *In re.* Ward *v.* Wood – | 517 |
| ——— *v.* Lambert and Butler. *In re* Wood's Trade-mark – | 247 |
| ———, Ward *v.* *In re* Wood – | 517 |
| Wood's Trade-mark, *In re.* Wood *v.* Lambert and Butler | 247 |
| Woodhouse, Edison and Swan Electric Light Company *v.* – | 520 |
| Wright, Davies *v.* – – – | 220 |
| Wykeham-Martin, Cornwallis *v.* *In re* Cornwallis – – – | 388 |

# TABLE OF CASES CITED.

## A.


| | | PAGE |
|---|---|---|
| Aberdeen Commercial Company *v.* Great North of Scotland Railway Company | 3 Nev. & Mac. 205 | 492 |
| Ackworth *v.* Ackworth | 1 Bro. C. C. 307, n. | 528 |
| Adams' Case | Law Rep. 13 Eq. 474 | 303 |
| Aird's Estate, In re | 12 Ch. D. 291 | 517 |
| Alcan's Estate, In re | 1 D. J. & S. 398 | 126 |
| Aldred's Estate, In re | 21 Ch. D. 228 | 414 |
| Alliance Bank *v.* Broom | 2 Dr. & Sm. 289 | 272 |
| Anderson's Trade-mark, In re | 54 L. J. (Ch.) 1084; 26 Ch. D. 409 | 314 |
| Arbuckle, Re | 14 W. R. 535 | 386 |
| Arnold, In re | 14 Ch. D. 270 | 18 |
| Aste *v.* Stumore | 13 Q. B. D. 326 | 593 |
| Athenæum Life Assurance Society *v.* Pooley | 3 De G. & J. 294 | 567 |
| Atkinson *v.* Smith | 3 De G. & J. 186 | 101 |
| Aylesford Peerage | 11 App. Cas. 1 | 163 |


## B.


| | | |
|---|---|---|
| Baggett *v.* Meux | 1 Coll. 138; 1 Ph. 627 | 363 |
| Bain *v.* Fothergill | Law Rep. 6 Ex. 59; 7 H. L. 158 | 459 |
| Baker, In re | 29 Ch. D. 711 | 140 |
| —— In re | 20 Ch. D. 230 | 575 |
| Banner, Ex parte | 17 Ch. D. 480 | 267 |
| Barker *v.* Wardle | 2 My. & K. 818 | 614 |
| Barnes *v.* Racster | 1 Y. & C. Ch. 401 | 179 |
| Barrows' Trade-Marks, In re | 5 Ch. D. 353 | 316 |
| Bartlett *v.* Bartlett | 1 De G. & J. 127 | 464 |
| Basham, In re | 23 Ch. D. 195 | 243 |
| Beale *v.* Symonds | 16 Beav. 406 | 432 |
| Bellasis *v.* Uthwatt | 1 Atk. 426 | 528 |
| Benton, In re | 19 Ch. D. 277 | 362 |
| Bethell *v.* Abraham | 3 Ch. D. 590, n. | 528 |
| Bickerton *v.* Walker | 31 Ch. D. 151 | 181 |
| Bingley *v.* Marshall | 6 L. T. (N.S.) 682 | 136 |
| Birt, In re | 22 Ch. D. 604 | 397 |
| Blake *v.* Harvey | 29 Ch. D. 827 | 635 |
| Bligh, In re | 12 Ch. D. 364 | 40 |

| | | PAGE |
|---|---|---|
| Bolton *v.* London School Board | 7 Ch. D. 766 | 421 |
| Bonelli's Electric Telegraph Company, In re | Law Rep. 18 Eq. 655 | 124 |
| Bovill *v.* Moore | Davies P. C. 361 | 522 |
| Bourne *v.* Bourne | 2 Hare, 35 | 432 |
| Bown, In re | 27 Ch. D. 411 | 363 |
| Bowring *v.* Shepherd | Law Rep. 6 Q. B. 309 | 628 |
| Box, In re | 1 H. & M. 552 | 412 |
| Boyse, In re | 20 Ch. D. 760 | 140 |
| Bradford Banking Company *v.* Briggs & Co. | 29 Ch. D. 149; 31 Ch. D. 19 | 266, 280 |
| Bradley *v.* Copley | 1 C. B. 685 | 492 |
| ——— *v.* Riches | 9 Ch. D. 189 | 178 |
| Brandon's Trusts, In re | 13 Ch. D. 773 | 39 |
| Brickenden *v.* Williams | Law Rep. 7 Eq. 310 | 510 |
| Bridge *v.* Beadon | Law Rep. 3 Eq. 664 | 465 |
| Britain *v.* Rossiter | 11 Q. B. D. 123 | 281 |
| British Imperial Corporation, In re | 5 Ch. D. 749 | 124, 349 |
| Brodie *v.* Bolton | 3 My. & K. 168 | 614 |
| Brown's Will, In re | 27 Ch. D. 179 | 235 |
| Buchan's Case | 4 App. Cas. 549 | 304 |
| Budge *v.* Gummow | Law Rep. 7 Ch. 719 | 201 |
| Bugden *v.* Bignold | 2 Y. & C. Ch. 377 | 179 |
| Burges *v.* Mawbey | T. & R. 167 | 231 |
| Burgess *v.* Wheate | 1 Eden. 177 | 432 |
| Busfield, In re | 32 Ch. D. 123 | 349 |


## C.


| | | |
|---|---|---|
| Cahill *v.* Cahill | 8 App. Cas. 420 | 67 |
| Caldecott *v.* Brown | 2 Hare, 144 | 414 |
| Caledonian Railway Company *v.* Guild | 1 Court Sess. Cas. 4th Series, 198 | 491 |
| Callisher *v.* Bischoffsheim | Law Rep. 5 Q. B. 449 | 267 |
| Campbell, Ex parte | 16 Ch. D. 198 | 397 |
| Cardigan *v.* Curzon-Howe | 30 Ch. D. 531 | 618 |
| Carpenter, In re | Kay, 418 | 333 |
| Carter *v.* Stubbs | 6 Q. B. D. 116 | 405 |
| Case *v.* James | 29 Beav. 512; 3 D. F. & J. 256 | 563 |
| Catley *v.* Sampson | 33 Beav. 551 | 432 |
| Catt's Trusts, Re | 2 H. & M. 46 | 393 |
| Chaplin *v.* Chaplin | 3 P. Wms. 245 | 529 |
| Chapman's Case | Law Rep. 1 Eq. 346 | 366 |
| Chaytor's Settled Estate Act, In re | 25 Ch. D. 651 | 402 |
| Cherry *v.* Heming | 4 Ex. 631 | 272 |
| Chichester (Lord) *v.* Coventry | Law Rep. 2 H. L. 71 | 528 |
| Chinnery *v.* Evans | 11 H. L. C. 115 | 575 |
| Clark *v.* Taylor | 1 Drew. 642 | 157 |
| Clark's Trust, In re | 1 Ch. D. 497 | 154 |
| Clarke *v.* Grant | 14 Ves. 519 | 279 |
| ——— *v.* Palmer | 21 Ch. D. 124 | 183 |
| Clive *v.* Carew | 1 J. & H. 199 | 68 |
| Cochrane *v.* Matthews | 10 Ch. D. 80, n. | 495 |
| Coles *v.* Bristowe | Law Rep. 4 Ch. 3 | 625 |
| Colgan, In re | 19 Ch. D. 305 | 231 |
| Collins *v.* Paddington (Vestry of) | 5 Q. B. D. 368 | 405 |
| Colyer *v.* Finch | 19 Beav. 500; 5 H. L. C. 905 | 179 |

| | | PAGE |
|---|---|---|
| Compton, In re | 30 Ch. D. 15 | 396 |
| Constable *v.* Howick | 5 Jur. (N.S.) 331 | 583 |
| Cook *v.* Wright | 1 B. & S. 559 | 267 |
| Cookney *v.* Anderson | 1 D. J. & S. 365 | 126 |
| Cooper *v.* Macdonald | 7 Ch. D. 288 | 363 |
| ——— *v.* ——— | Law Rep. 16 Eq. 258 | 528 |
| ——— *v.* Willomatt | 1 C. B. 672 | 492 |
| Cordingley *v.* Cheeseborough | 8 Jur. (N.S.) 585, 755; 3 Giff. 496; 4 D. F. & J. 379 | 15, 18 |
| Cory *v.* Eyre | 1 D. J. & S. 149 | 178 |
| Credits Gerundeuse *v.* Van Weede | 12 Q. B. D. 171 | 123 |
| Crofts *v.* Middleton | 8 D. M. & G. 192 | 100 |
| Cross *v.* Kennington | 11 Beav. 89 | 615 |
| Crowther *v.* Farrer | 15 Q. B. 677 | 272 |
| Cuming, In re | Law Rep. 5 Ch. 72 | 336 |
| Cutler *v.* Simons | 2 Mer. 103 | 329 |


## D.


| | | |
|---|---|---|
| Dalglish *v.* Jarvie | 2 Mac. & G. 231 | 423 |
| Dames & Wood, In re | 29 Ch. D. 626 | 18 |
| D'Angibau, In re | 15 Ch. D. 228 | 100 |
| Davenport *v.* Moss | 14 W. R. 453 | 396 |
| Davies' Trusts, In re | Law Rep. 13 Eq. 163 | 509 |
| Dawson *v.* Dawson | Law Rep. 4 Eq. 504 | 528 |
| De Bussche *v.* Alt | 8 Ch. D. 286 | 575 |
| Denny *v.* Barton | 2 Phillim. 575 | 606 |
| Dimmock *v.* Hallett | Law Rep. 2 Ch. 21 | 29 |
| Dixon *v.* Peacock | 3 Drew. 288 | 413 |
| Donellan *v.* Read | 3 B. & Ad. 899 | 272 |
| Doughty *v.* Bull | 2 P. Wms. 320 | 411 |
| Drummond *v.* Drummond | Law Rep. 2 Ch. 32 | 126 |
| Duddell *v.* Simpson | Law Rep. 2 Ch. 102 | 19 |
| Dudley, In re | 12 Q. B. D. 44 | 343 |
| Durham (Earl of) *v.* Wharton | 3 Cl. & F. 146 | 529 |


## E.


| | | |
|---|---|---|
| Edwards *v.* Baugh | 11 M. & W. 641 | 272 |
| Edwards' Trade-mark, In re. Edwards *v.* Dennis | 30 Ch. D. 454 | 117, 257, 314 |
| Elder *v.* Maclean | 5 W. R. 447 | 460 |
| Ellis' Trusts, In re | Law Rep. 17 Eq. 409 | 362 |
| Ellison *v.* Ellison | 6 Ves. 656 | 101 |
| Essery *v.* Cowlard | 26 Ch. D. 191 | 240 |
| Eustace, In the Goods of | Law Rep. 3 P. & M. 183 | 606 |
| Evans *v.* Bremridge | 8 D. M. & G. 100 | 240 |
| ——— *v.* Wood | Seton, 4th Ed. p. 1378 | 634 |
| Evershed *v.* London and North Western Railway Company | 3 Q. B. D. 134 | 492 |


## F.


| | | |
|---|---|---|
| Farina's Trade-marks, In re | 29 W. R. 391 | 215 |
| Farrer *v.* Lacy, Hartland & Co. | 31 Ch. D. 42 | 637 |

| | | PAGE |
|---|---|---|
| Fawsitt, In re | 30 Ch. D. 231 | 124, 449 |
| Fearnside & Deans' Case | Law Rep. 1 Ch. 231 | 303 |
| Fell *v.* Brown | 2 Bro. C. C. 276 | 433 |
| Field *v.* Newport Railway Company | 27 L. J. (Ex.) 396; 3 H. & N. 409 | 489 |
| Ford *v.* Foster | Law Rep. 7 Ch. 611 | 249 |
| Fordham *v.* Wallis | 10 Hare, 217 | 574 |
| Foster & Lister, In re | 6 Ch. D. 87 | 100 |
| Fowler, In re | 16 Ch. D. 723 | 412 |
| Fox *v.* Buckley | 3 Ch. D. 508 | 599 |
| Freemoult *v.* Dedire | 1 P. Wms. 429 | 539 |
| Freston, In re | 11 Q. B. D. 545 | 343 |
| Fry *v.* Tapson | 28 Ch. D. 268 | 201 |
| —— *v.* Wood | 1 Atk. 445 | 139 |


## G.


| | | |
|---|---|---|
| Gale *v.* Gale | 6 Ch. D. 144 | 100 |
| Gard *v.* Commissioners of Sewers of the City of London | 28 Ch. D. 486 | 77 |
| Gardner *v.* Cowles | 3 Ch. D. 304 | 222 |
| Gartness Iron Company, In re | Law Rep. 10 Eq. 412 | 42 |
| Gaved *v.* Martyn | 19 C. B. (N.S.) 732 | 553 |
| General International Agency Company, Re | 16 L. T. (N.S.) 725 | 349 |
| Gibbons *v.* Snape | 1 D. J. & S. 621 | 95 |
| Gilbert *v.* Overton | 2 H. & M. 110 | 101 |
| Gill *v.* Continental Union Gas Company | Law Rep. 7 Ex. 332 | 514 |
| Godfrey, In re | 23 Ch. D. 483 | 202 |
| Goldsmith *v.* Russell | 5 D. M. & G. 547 | 614 |
| Goodfellow *v.* Burchett | 2 Vern. 298 | 528 |
| Gordon *v.* James | 30 Ch. D. 249 | 182 |
| Griffiths, In re | 26 Ch. D. 465 | 244 |
| Guinness *v.* Land Corporation of Ireland | 22 Ch. D. 349 | 51 |
| Guthrie *v.* Walrond | 22 Ch. D. 573 | 409 |


## H.


| | | |
|---|---|---|
| Hall *v.* Liardet | W. N. 1883, pp. 165, 194 | 592 |
| —— *v.* London, Brighton, and South Coast Railway Company | 15 Q. B. D. 505 | 491 |
| Hallett's Estate, In re | 13 Ch. D. 696 | 563 |
| Haly *v.* Barry | Law Rep. 3 Ch. 452 | 465 |
| Haney's Trusts, In re | Law Rep. 10 Ch. 275 | 124 |
| Harding, Ex parte | Law Rep. 3 Eq. 341 | 366 |
| ——— *v.* Williams | 14 Ch. D. 197 | 501 |
| Hardman *v.* Child | 28 Ch. D. 712 | 19 |
| Harter *v.* Colman | 19 Ch. D. 630 | 464 |
| Harvey *v.* Harvey | 23 W. R. 478 | 606 |
| Harwood, In re | 20 Ch. D. 536 | 224 |
| Havelock *v.* Havelock | 17 Ch. D. 807 | 229, 383 |
| Haytor Granite Company, In re | Law Rep. 1 Ch. 77 | 42 |
| Heales *v.* M'Murray | 23 Beav. 401 | 60 |
| Hebb's Case | Law Rep. 4 Eq. 9 | 307 |
| Heppenstall *v.* Hose | 51 L. T. (N.S.) 589; 33 W. R. 30 | 18 |

| | | PAGE |
|---|---|---|
| Hewison *v.* Negus | 16 Beav. 594 | 99 |
| Higgins & Hitchman's Contract, In re | 21 Ch. D. 95 | 454 |
| Hill *v.* Gomme | 5 My. & Cr. 250 | 107 |
| Hills *v.* M'Rae | 9 Hare, 297 | 449 |
| Hinchcliffe *v.* Hinchcliffe | 3 Ves. 516 | 528 |
| Hirsch *v.* Coates | 18 C. B. 757 | 514 |
| Hirst *v.* Denham | Law Rep. 14 Eq. 542 | 249 |
| Hogg *v.* Jones | 32 Beav. 45 | 394 |
| Holloway *v.* Holloway | 13 Beav. 209 | 316 |
| Holmes, In re | 29 Ch. D. 786 | 464 |
| Holroyd *v.* Marshall | 10 H. L. C. 191 | 534 |
| Honeywood *v.* Foster | 30 Beav. 1 | 95 |
| Hopkinson *v.* Rolt | 9 H. L. C. 514 | 272 |
| Hopper *v.* Conyers | Law Rep. 2 Eq. 549 | 563 |
| Horne *v.* Horne | 14 W. R. 957 | 614 |
| Horsey's Claim | Law Rep. 5 Eq. 561 | 42 |
| Horsfall *v.* Halifax and Huddersfield Union Banking Company | 52 L. J. (Ch.) 599 | 272 |
| Hotchkys, In re | 32 Ch. D. 408 | 434 |
| Hughes *v.* Turner | 4 Hagg. Eccl. 52 | 606 |
| Huguenin *v.* Baseley | 14 Ves. 273 | 563 |
| Hunter *v.* Walters | Law Rep. 7 Ch. 75 | 181 |
| Hyde *v.* Johnson | 2 Bing. N. C. 776 | 338 |


## I.


| | | |
|---|---|---|
| Ickeringell's Estate, In re | 17 Ch. D. 151 | 510 |
| Ingle *v.* Partridge | 34 Beav. 411 | 201 |
| Ireland *v.* Livingstone | Law Rep. 5 H. L. 395 | 628 |


## J.


| | | |
|---|---|---|
| Jackson *v.* Hudson | 2 Camp. 447 | 448 |
| ——— *v.* Turquand | Law Rep. 4 H. L. 305 | 304 |
| James, Ex parte | Law Rep. 9 Ch. 609 | 597 |
| ——— *v.* Williams | 3 Nev. & Man. 196 | 282 |
| Jenner-Fust *v.* Needham | 31 Ch. D. 500 | 194 |
| Jennings *v.* Jordan | 6 App. Cas. 698 | 464 |
| Jeston *v.* Key | Law Rep. 6 Ch. 610 | 240 |
| Jones, In re | 31 Ch. D. 440 | 396 |
| Joselyne, Ex parte | 8 Ch. D. 327 | 513 |
| Joyce *v.* Hutton | 11 Ir. Ch. Rep. 123 | 107 |
| Joys, In the Goods of | 4 Sw. & Tr. 214; 30 L. J. (P. M. & A.) 169 | 606 |


## K.


| | | |
|---|---|---|
| Kearns *v.* Leaf | 1 H. & M. 681 | 42 |
| Keate *v.* Phillips | 18 Ch. D. 560 | 182 |
| Kekewich *v.* Manning | 1 D. M. & G. 176 | 101 |
| Kensington (Lord) *v.* Bouverie | 7 D. M. & G. 134 | 63 |
| Kerr *v.* Preston (Corporation of) | 6 Ch. D. 463 | 504 |
| King *v.* Malcott | 9 Hare, 692 | 42 |
| Kinloch *v.* Nevile | 6 M. & W. 795 | 553 |

## L.


| | | PAGE |
|---|---|---|
| Lamb's Trusts, In re | 28 Ch. D. 77 | 227 |
| Land Credit Company of Ireland, In re | 39 L. J. (Ch.) 389 | 349 |
| Leadbitter, In re | 10 Ch. D. 388 | 37 |
| Leigh's Estate, In re | Law Rep. 6 Ch. 887 | 412 |
| Leighton *v.* Leighton | Law Rep. 18 Eq. 458 | 533 |
| Leonard & Ellis' Trade-mark, In re | 26 Ch. D. 288 | 249, 316 |
| Lethbridge *v.* Thurlow | 15 Beav. 334 | 528 |
| Lilford (Lord) *v.* Attorney-General | Law Rep. 2 H. L. 63 | 393 |
| Linoleum Manufacturing Company *v.* Nairn | 7 Ch. D. 834 | 249, 316 |
| Livesey *v.* Harding | 23 Beav. 141 | 464 |
| Loveridge *v.* Cooper | 3 Russ. 1 | 464 |
| Loyd *v.* Lee | 1 Str. 94 | 281 |
| Lyde *v.* Mynn | 1 My. & K. 683 | 539 |
| Lydney and Wigpool Iron Ore Company *v.* Bird | 31 Ch. D. 328 | 402 |
| Lysaght *v.* Edwards | 2 Ch. D. 499 | 334 |


## M.


| | | |
|---|---|---|
| McCarogher *v.* Whieldon | Law Rep. 3 Eq. 236 | 529 |
| McEwan *v.* Crombie | 25 Ch. D. 175 | 243 |
| McIlroy *v.* Duncan | W. N. 1884, p. 48 | 593 |
| McKenzie *v.* Hesketh | 7 Ch. D. 675 | 18 |
| McRae, In re | 25 Ch. D. 16 | 449 |
| Maddison *v.* Alderson | 8 App. Cas. 467 | 281 |
| Mair's Estate, Re | 21 W. R. 749 | 35 |
| Mallorie's Case | Law Rep. 2 Ch. 181 | 304 |
| March *v.* Russell | 3 My. & Cr. 31 | 574 |
| Marler's Trade Mark, In re | 29 W. R. 392 | 215 |
| Marsden, In re | 26 Ch. D. 783 | 574 |
| Marsh, In re | 15 Q. B. D. 340 | 36 |
| Martyn, In re | 26 Ch. D. 745 | 227 |
| Matthews *v.* Gabb | 15 Sim. 51 | 464 |
| Maugham, Re | 22 W. R. 748 | 130 |
| Mawson *v.* Fletcher | Law Rep. 6 Ch. 91 | 18 |
| Mayhew *v.* Crickett | 2 Sw. 185 | 67 |
| Mellor *v.* Watkins | Law Rep. 9 Q. B. 400 | 377 |
| Meredith, In the Goods of | 29 L. J. (P. M. & A.) 155 | 606 |
| Merritt, In the Goods of | 1 Sw. & Tr. 112; 4 Jur. (N.S.) 1192 | 606 |
| Metcalfe *v.* Canterbury (Archbishop of) | 1 My. & Cr. 547 | 539 |
| Metropolitan District Railway Company and Cosh, In re | 13 Ch. D. 607 | 455 |
| Meux *v.* Bell | 1 Hare, 73 | 465 |
| Mewburn's Settled Estates, In re | W. N. 1874, p. 156; 22 W. R. 752 | 129 |
| Millership *v.* Brookes | 5 H. & N. 797 | 239 |
| Mills *v.* Jennings | 13 Ch. D. 639 | 464 |
| Minors *v.* Battison | 1 App. Cas. 428 | 411 |
| Mitchell *v.* Henry | 15 Ch. D. 181 | 315 |
| Monckton and Gilzean, In re | 27 Ch. D. 555 | 19 |
| Mornington (Countess of) *v.* Keane | 2 De G. & J. 292 | 533 |

## N.


| | | PAGE |
|---|---|---|
| Nadin *v.* Bassett | 25 Ch. D. 21 | 140 |
| National Funds Assurance Company, In re | 10 Ch. D. 118 | 51 |
| Naylor's Residuary Personal Estate, Re | 28 L. T. (N.S.) 18 | 129 |
| Neilson *v.* James | 9 Q. B. D. 546 | 629 |
| Nelson-Mitchell *v.* City of Glasgow Bank | 6 Court Sess. Cas. 4th Ser. 420; 4 App. Cas. 624 | 628 |
| Neve *v.* Pennell | 2 H. & M. 170 | 464 |
| New London and Brazilian Bank *v.* Brocklebank | 21 Ch. D. 302 | 272 |
| Newcastle's (Duke of) Estates, In re | 24 Ch. D. 129 | 235 |
| Newcombe *v.* Downe | Seton on Decrees 4th Ed., p. 1149 | 432 |
| Newcomen *v.* Coulson | 5 Ch. D. 133 | 377 |
| Nicol's Case | 29 Ch. D. 421 | 307 |
| Nurse *v.* Durnford | 13 Ch. D. 764 | 245 |


## O.


| | | |
|---|---|---|
| Ockford *v.* Barelli | 20 W. R. 116. | 267 |
| Odell, Ex parte | 10 Ch. D. 76 | 490 |
| Oldershaw *v.* King | 2 H. & N. 399, 517 | 289 |
| Oppenheimer *v.* British and Foreign Exchange and Investment Bank | 6 Ch. D. 744 | 42 |
| Orr-Ewing *v.* Registrar of Trade-marks | 4 App. Cas. 479 | 316 |
| Owen *v.* Van Uster | 10 C. B. 318 | 449 |


## P.


| | | |
|---|---|---|
| Page *v.* Horne | 9 Beav. 570; 11 Beav. 227 | 240 |
| Palk *v.* Clinton (Lord) | 12 Ves. 48 | 433 |
| Palmer's Trade-mark, In re | 24 Ch. D. 504; 21 Ch. D. 47 | 249, 258 |
| Parker *v.* McKenna | 43 L. J. (Ch.) 802 | 136 |
| Pearce *v.* Morris | Law Rep. 5 Ch. 227 | 433 |
| Pearson, Re | 51 L. T. (N.S.) 692 | 196 |
| Perry *v.* Barnett | 15 Q. B. D. 388 | 629 |
| Perry-Herrick *v.* Attwood | 25 Beav. 205; 2 De G. & J. 21 | 183 |
| Pickering *v.* Ilfracombe Railway Company | Law Rep. 3 C. P. 235 | 514 |
| Pilcher *v.* Rawlins | Law Rep. 7 Ch. 259 | 181 |
| Pilling's Trusts, In re | 26 Ch. D. 432 | 334 |
| Pinède's Settlement, In re | 12 Ch. D. 667 | 509 |
| Pinnock *v.* Bailey | 23 Ch. D. 497 | 465 |
| Player *v.* Foxhall | 1 Russ. 538 | 397 |
| Plimpton *v.* Malcolmson | 3 Ch. D. 531 | 522 |
| Pollock, In re | 28 Ch. D. 552 | 533 |
| Pope *v.* Great Eastern Railway Company | Law Rep. 3 Eq. 171 | 329 |
| Portman *v.* Mill | 2 Russ. 570 | 19 |
| Potteries, Shrewsbury and North Wales Railway Company, In re | 25 Ch. D. 251 | 440 |
| Potts *v.* Potts | 1 H. L. C. 671 | 394 |
| Powys *v.* Blagrave | Kay, 495; 4 D. M. & G. 448 | 412 |
| Prees *v.* Coke | Law Rep. 6 Ch. 645 | 583 |
| Price *v.* Jenkins | 4 Ch. D. 483; 5 Ch. D. 619 | 102 |
| Pugh *v.* Vaughan | 12 Beav. 517 | 412 |
| Pye, Ex parte | 18 Ves. 140 | 537 |

## R.


| | | PAGE |
|---|---|---|
| Ralph's Trade-mark, In re | 25 Ch. D. 194 | 249 |
| Raw, In re | 26 Ch. D. 601 | 411 |
| Ray's Settled Estates, In re | 25 Ch. D. 464 | 618 |
| Read *v.* Anderson | 13 Q. B. D. 779 | 628 |
| Reay's Estate, In re | 1 Jur. (N.S.) 222; 3 N. R. 312 | 35 |
| Reg. *v.* Kent (Justices of) | Law Rep. 8 Q. B. 305 | 341 |
| Revel *v.* Watkinson | 1 Ves. Sen. 93 | 231, 412 |
| Rice *v.* Rice | 2 Drew. 73 | 181 |
| Richmond *v.* White | 12 Ch. D. 361 | 396 |
| Ridgway *v.* Newstead | 3 D. F. & J. 474 | 574 |
| Ridler, In re | 22 Ch. D. 74 | 104 |
| Rivett-Carnac's (Sir J.) Will, In re | 30 Ch. D. 136 | 162 |
| Riviere's Trade-mark, Re | 53 L. T. (N.S.) 237 | 215 |
| ———, In re | 26 Ch. D. 48 | 316 |
| Robinson *v.* Dickenson | 3 Russ. 399 | 240 |
| ——— *v.* Nesbitt | Law Rep. 3 C. P. 264 | 514 |
| ——— *v.* Robinson | 19 Beav. 494 | 411 |
| ——— *v.* Wheelwright | 6 D. M. & G. 535 | 363 |
| Roddam *v.* Morley | 1 De G. & J. 1 | 575 |
| Rosing's Application, In re | 54 L. J. (Ch.) 975 | 112 |
| Roundell *v.* Breary | 2 Vern. 482 | 539 |
| Rowbotham *v.* Wilson | 8 H. L. C. 348 | 377 |
| Russell's Estate, In re | 35 L. J. (Ch.) 461 | 334 |
| Rust & Co.'s Trade-mark, In re | 29 W. R. 393 | 215 |


## S.


| | | |
|---|---|---|
| Saint *v.* Pilley | Law Rep. 10 Ex. 137 | 377 |
| Sambroke *v.* Hanbury | Seton on Decrees, 4th Ed. p. 1149 | 432 |
| Sanders *v.* Homer | 25 Beav. 467 | 224 |
| Sarel, Re | 4 N. R. 321 | 362 |
| Saull *v.* Browne | Law Rep. 10 Ch. 64 | 504 |
| Saunderson *v.* Griffiths | 5 B. & C. 909 | 618 |
| Savage, In re | 15 Ch. D. 557 | 245 |
| Sawyer *v.* Sawyer | 28 Ch. D. 595 | 68 |
| Sayers *v.* Collyer | 28 Ch. D. 103 | 130 |
| Scarfe *v.* Morgan | 4 M. & W. 270 | 492 |
| Schreiber *v.* Dinkel | 54 L. J. (Ch.) 241 | 100 |
| Scotson *v.* Pegg | 6 H. & N. 295 | 282 |
| Scott *v.* Hastings (Lord) | 4 K. & J. 633 | 514 |
| Seymour *v.* Bridge | 14 Q. B. D. 460 | 628 |
| Shaw *v.* Fisher | 5 D. M. & G. 596 | 628 |
| —— *v.* Foster | Law Rep. 5 H. L. 321 | 182 |
| Shropshire Union Railways and Canal Company *v.* Reg. | Law Rep. 7 H. L. 496 | 179 |
| Simmonds, Ex parte | 16 Q. B. D. 308 | 597 |
| Smethurst *v.* Hastings | 30 Ch. D. 490 | 201 |
| Smith *v.* Dale | 18 Ch. D. 516 | 244 |
| ——— *v.* Davies | 28 Ch. D. 650 | 636 |
| ——— *v.* Winter | 4 M. & W. 454 | 68 |
| Société Générale de Paris *v.* Tramways Union Company | 14 Q. B. D. 424 | 272 |
| Sotheram *v.* Dening | 20 Ch. D. 99 | 606 |
| Speight *v.* Gaunt | 22 Ch. D. 727; 9 App. Cas. 1 | 202 |
| Spencer's Case | 17 Beav. 203 | 303 |

| | | PAGE |
|---|---|---|
| Spiller *v.* Maude | 32 Ch. D. 158, n. | 158 |
| Stafford *v.* Stafford | 1 De G. & J. 193 | 68 |
| Stanhope *v.* Verney (Earl) | 2 Eden. 81 | 182 |
| Stanton *v.* Hatfield | 1 Keen, 358 | 614 |
| Steele *v.* M'Kinlay | 5 App. Cas. 754 | 448 |
| Stephens, Ex parte | 3 Ch. D. 659 | 316 |
| Surtees *v.* Lister | 30 L. J. (Ex.) 369 | 282 |
| Sutton *v.* Doggett | 3 Beav. 9 | 614 |
| Swabey *v.* Dovey | 32 Ch. D. 352 | 593 |
| Syer *v.* Gladstone | 30 Ch. D. 614 | 409 |


## T.


| | | |
|---|---|---|
| Talbot *v.* Frere | 9 Ch. D. 568 | 396 |
| ——— *v.* Radnor (Earl) | 3 My. & K. 252 | 412 |
| Taylor *v.* Plumer | 3 M. & S. 562 | 563 |
| ——— *v.* Taylor | 23 L. J. (Ch.) 255 | 316 |
| ——— *v.* ——— | Law Rep. 20 Eq. 297 | 412 |
| Taylor's Estate, In re | 22 Ch. D. 495 | 517 |
| Teasdale *v.* Braithwaite | 4 Ch. D. 85; 5 Ch. D. 630 | 99 |
| Telegraph Construction Company, In re | Law Rep. 10 Eq. 384 | 42 |
| Teuliere *v.* St. Mary Abbotts, Kensington (Vestry of) | 30 Ch. D. 642 | 76 |
| Thomas *v.* Brennan | 15 L. J. (Ch.) 420 | 240 |
| ——— *v.* Daw | Law Rep. 2 Ch. 1; 14 W. R. 300 | 72, 82 |
| ——— *v.* Jones | 1 Dr. & Sm. 134 | 614 |
| ——— *v.* Williams | 1 Ad. & E. 685 | 368 |
| ——— *v.* ——— | 24 Ch. D. 558 | 618 |
| Thomas' Case | Law Rep. 13 Eq. 437 | 307 |
| Thompson *v.* Tomkins | 2 Dr. & Sm. 8 | 464 |
| Thorndike *v.* Hunt | 3 De G. & J. 563 | 465, 563 |
| Tickle *v.* Brown | 4 Ad. & E. 369 | 553 |
| Tidd *v.* Lister | 5 Madd. 429 | 412 |
| Titley *v.* Davies | 2 Y. & C. (Ch.) 399, n. | 464 |
| Trestrail *v.* Mason | 7 Ch. D. 655 | 433 |
| Trimmer *v.* Bayne | 7 Ves. 508 | 533 |
| Troughton *v.* Hunter | 18 Beav. 470 | 359 |
| Turner *v.* Turner | 15 Jur. 218 | 505 |
| Tussaud *v.* Tussaud | 9 Ch. D. 363 | 533 |


## U.


| | | |
|---|---|---|
| Underwood, In re | 3 K. & J. 745 | 433 |


## V.


| | | |
|---|---|---|
| Van Hagan, In re | 16 Ch. D. 18 | 510 |
| Vane *v.* Vane | 2 Ch. D. 124 | 39 |
| Vardon's Trusts, In re | 31 Ch. D. 275 | 363 |
| Vyse *v.* Foster | Law Rep. 8 Ch. 309 | 412 |

## W.


| | | PAGE |
|---|---|---|
| Waldron *v.* Sloper | 1 Drew. 193 | 181 |
| Wallis *v.* London & South Western Railway Company | Law Rep. 5 Ex. 62 | 489 |
| Walter *v.* James | 34 W. R. 29 | 405 |
| Warburton *v.* Hill | Kay, 470 | 465 |
| Ward *v.* Carttar | 35 Beav. 171 | 60 |
| Watkins *v.* Nash | Law Rep. 20 Eq. 262 | 239 |
| Watson *v.* Sadlier | 1 Moll. 585 | 539 |
| Watts *v.* Porter | 3 E. & B. 743 | 515 |
| Webster *v.* Cecil | 30 Beav. 62 | 18 |
| Weldon *v.* Gounod | 15 Q. B. D. 622 | 123 |
| Westwood, Re | 6 N. R. 61, 316 | 224 |
| Wheelwright *v.* Walker | 23 Ch. D. 752 | 235, 618 |
| Whittemore *v.* Whittemore | Law Rep. 8 Eq. 603 | 15 |
| Willoughby Osborne *v.* Holyoake | 22 Ch. D. 238 | 510 |
| Wilson *v.* Northampton and Banbury Junction Railway Company | Law Rep. 9 Ch. 279 | 440 |
| Wood *v.* Waud | 3 Ex. 748 | 553 |
| Woodcock *v.* Oxford and Worcester Railway Company | 1 Drew. 521 | 57 |
| Woolley *v.* Colman | 21 Ch. D. 169 | 220 |
| Worthington & Co.'s Trade-mark, In re | 14 Ch. D. 8 | 109, 315 |
| Wray *v.* Kemp | 26 Ch. D. 169 | 245 |
| Wright *v.* Rose | 2 S. & S. 323 | 432 |


## Y.


| | | |
|---|---|---|
| Yeilding & Westbrook, In re | 31 Ch. D. 344 | 454 |
| York, (Mayor of) *v.* Pilkington | 2 Atk. 302 | 505 |
| Yorkshire Railway Wagon Company *v.* Maclure | 19 Ch. D. 478; 21 Ch. D. 309 | 489 |
| Young & Harston's Contract, In re | 29 Ch. D. 691 | 455 |

# CASES

DETERMINED BY THE

# CHANCERY DIVISION

AND IN

# LUNACY

AND ON APPEAL THEREFROM IN THE

# COURT OF APPEAL.

---

## *In re* DUKE OF MARLBOROUGH'S SETTLEMENT. DUKE OF MARLBOROUGH *v.* MARJORIBANKS.

C. A. 1886 *Feb.* 4, 6, 15.

[1885 M. 524.]

*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 21, *subs.* ii., 22, 37, 53—*Heirlooms—Sale—Application of Proceeds—Discharge of Incumbrances.*

The money arising by the sale, on the application of the tenant for life with the sanction of the Court, of chattels treated in a settlement as heirlooms, and so far as the rules of law and equity would permit annexed to the settled freehold land, may be applied in the discharge of incumbrances affecting the inheritance of the settled land, without keeping such incumbrances on foot for the benefit of the infant remainderman in whom the heirlooms would, if unsold, have vested absolutely on his attaining twenty-one.

Decision of *Chitty*, J., affirmed.

## Adjourned Summons.

By settlement of the 14th of July, 1866, certain freehold hereditaments were assured and limited, subject to mortgages or incumbrances affecting the same, and subject to a term for securing payment of certain moneys, and to certain yearly rentcharges, from and after the death of the late Duke of *Marlborough*, to the use of the present duke and his assigns during his life without impeachment of waste, and after his death to the use of his first and every other son successively according to their respective seniorities, and the heirs male of their respective bodies, with remainders over. The settlement contained the usual powers of sale and exchange of the freeholds thereby settled, with direc-

C. A. 1886

*In re* DUKE OF MARLBOROUGH'S SETTLEMENT.

DUKE OF MARLBOROUGH *v.* MARJORIBANKS.

tions for investment of the proceeds of any sale in the purchase of lands to be settled to the same uses. The collection of pictures at *Blenheim* and other chattels, articles, and effects, which were treated as heirlooms, were assigned to the trustees upon trust to allow the same to be used and enjoyed so far as the rules of law and equity would permit by the person or persons, who, under the settlement, should, for the time being, be in the actual possession or in the receipt of the rents and profits of the freehold hereditaments, but so that the same should not vest absolutely in any person thereby made tenant in tail male by purchase, unless such person should attain the age of twenty-one years, but the same should go, devolve and remain in the same manner as if they had been freehold hereditaments of inheritance and had been settled accordingly.

The applicant, the present Duke, succeeded to the title and the estates upon the death of his father in July, 1882, and has an infant son, the Marquis of *Blandford*, the first tenant in tail under the settlement.

Under orders made in Chambers on the application of the present duke, three sets of pictures from the *Blenheim Gallery*, being part of the chattels comprised in the settlement of 1866, had been sold, with the sanction of the Court, under the *Settled Land Act*, 1882, s. 37, for sums amounting to £185,000, which had been paid to the trustees of the estate. The last order for sale, made on the 3rd of February, 1885, contained an undertaking by the present Duke within one month to raise the question whether any part of the proceeds of the sale of the heirlooms could be properly reinvested so as to devolve as the settled real estate, and in the meantime not to direct any such reinvestment of the proceeds of sale now sanctioned, and to abide by any direction of the Court as to the reinvestment of the proceeds in the purchase of chattels upon the application of the trustees or guardian of the infant.

In pursuance of the undertaking this summons was taken out by the Duke for liberty to reinvest £68,550, part of the sum arising from sales prior to that sanctioned by the order of the 3rd of February, 1885, in the discharge of certain mortgages affecting the inheritance of freehold lands now subject to the trusts of the settlement of the 14th of July, 1866.

Mr. Justice *Chitty* was of opinion that the money in question might be laid out in the discharge of the mortgages affecting the inheritance of the freehold lands (1).

The guardian of the infant remainderman appealed, and the appeal came on for argument on the 4th and 6th of February, 1886.

Sir *Henry James*, Q.C., and *F. A. Lewin* (*Romer*, Q.C., with them), for the guardian of the infant remainderman :—

The provisions of the *Settled Land Act*, 1882 (45 & 46 Vict. c. 38), which deal with heirlooms, are contained in sect. 37, and the sale in the present case took place under the order of the Court pursuant to sub-sect. 3 of that section. The question is, what is to be done with the capital money arising from the sale of the heirlooms? Sects. 21 and 22 are important, the crucial clause being sect. 22, sub-sect. 5; if the word "land" in that enactment includes heirlooms, the Appellant ought to succeed; if it does not, the circumstances of the present case have not been provided for. To apply the proceeds of the sale of the heirlooms in discharge of the incumbrances would be a breach of duty by the tenant for life, who by sect. 53 is in the position of a trustee; in no case can a trustee alter the devolution of property without an express power contained in the instrument creating the settlement.

*Macnaghten*, Q.C., and *Phipson Beale*, for the Duke of *Marlborough* :—

If the mortgages are paid off, the value of the settled freehold lands is increased. The tenant for life has the right to invest the proceeds of the sale of the heirlooms in any manner mentioned in sect. 21, provided he acts honestly. The Legislature has dealt with the question in a broad spirit, and it cannot be a breach of trust to do that which the statute has authorized. The object was to leave to the tenant for life the right of determining in what manner the estate could be most effectually benefited.

*Ince*, Q.C., and *Willis Bund*, for the trustees.

(1) 30 Ch. D. 127.

C. A. 1886 *In re* DUKE OF MARLBOROUGH'S SETTLEMENT. DUKE OF MARLBOROUGH *v.* MARJORIBANKS.

1886. Feb. 15. LORD ESHER, M.R.:—

The question is whether certain money which represents the proceeds of the sale of heirlooms settled upon certain trusts, without mentioning any other mode of investment, should be used to discharge certain mortgages affecting the inheritance of freehold lands, or whether this money should be so invested, that when the infant tenant in tail becomes of full age, he shall have the same power with regard to the money as he would have had if the heirlooms had remained *in specie* as chattels. The whole matter depends on what is the true construction of the *Settled Land Act*, 1882. I have read through that Act for the purpose of trying to find out which way the decision ought to be. The first section which it is necessary to consider is sect. 37, sub-s. 1: "Where personal chattels are settled on trust so as to devolve with land until a tenant in tail by purchase is born or attains the age of twenty-one years"—that I take to be a description really of heirlooms—"or so as otherwise to vest in some person becoming entitled to an estate of freehold of inheritance in the land"—that is another description of heirlooms—"a tenant for life of the land may sell the chattels or any of them." But then sub-sect. 3 says: "A sale or purchase of chattels under this section shall not be made without an order of the Court." It seems to me, putting these enactments together, that there cannot be a reckless and unnecessary sale of heirlooms by the tenant for life. There must be an order of the Court, and if the tenant for life were to attempt to sell the heirlooms merely for his own will and pleasure, without any colour of necessity, I think that the Court would not allow the heirlooms to be sold; for instance, if the estate were in perfect condition and were free from all incumbrance, I should suppose that the Court would at once refuse the order. Who would be the parties to raise the objection, I do not think it necessary at the present moment to consider. The trustees certainly, in my opinion, would be entitled to raise it. An order of that kind has been obtained in this case, and the heirlooms have been sold, and, we must take it, properly sold. Sub-sect. 2 of the same section says: "The money arising by the sale"—that is by an authorized sale—"shall be capital money arising under this Act"—we must presently look for the inter-

pretation of that phrase to other parts of the Act—"and shall be paid, invested, or applied, and otherwise dealt with in like manner in all respects as by this Act directed with respect to other capital money arising under this Act." The first provision is that it shall be paid in the like manner "in all respects as by this Act directed with respect to other capital money"; it shall be "invested" in the same manner, if it is invested, or it shall be "applied." A distinction is drawn between "investing" and "applying." We find used twice over the phrase "capital money arising under this Act." In order to find out what that is, we must look back to sect. 2, sub-sect. 9: "Capital money arising under this Act and receivable for the trusts and purposes of the settlement, is in this Act referred to as capital money arising under this Act." I cannot help thinking that that is a rather oddly expressed sub-section. I think it would require to be turned round, as it were, and to enact that "money receivable under this Act for the trusts and purposes of the settlement in this Act is capital money arising under this Act, and is so referred to." We must see now how "capital money arising under this Act" so interpreted is dealt with in the Act. That sends us really to sect. 21: but, in dealing with the matter in order of time, where heirlooms are sold and where the money is to be disposed of, it seems to me that sect. 22 deals with the matter before it is to be dealt with under sect. 21. Now sect. 22, sub-sect. 1, is: "Capital money arising under this Act shall, in order to its being invested or applied as aforesaid"—there, again, is the distinction between "invested" and "applied"—"be paid either to the trustees of the settlement or into Court at the option of the tenant for life, and shall be invested or applied by the trustees, or under the direction of the Court, as the case may be, accordingly." The words, "under the direction of the Court," may be applicable both when the money is paid into Court and when it is in the hands of the trustees. By sub-sect. 2, "The investment or other application by the trustees shall be made according to the direction of the tenant for life." Therefore, if it is paid to the trustees, they must act according to his direction. By sub-sect. 3, "The investment or other application under the direction of the Court shall be made on the application of the tenant for life or of the

C. A. 1886

*In re* DUKE OF MARLBOROUGH'S SETTLEMENT. DUKE OF MARLBOROUGH *v.* MARJORIBANKS.

Lord Esher, M.R.

trustees." The application may be made in the alternative either by the tenant for life or the trustees. By sub-sect. 5, "Capital money arising under this Act, while remaining uninvested or unapplied,"—that must be whilst it is either in the hands of the trustees or in the hands of the Court, as just before described—"while remaining uninvested or unapplied"—this applies to the interval of time before anything is done with the money except paying it either to the trustees or into Court—"shall, for all purposes of disposition, transmission, and devolution, be considered as land, and the same shall be held for and go to the same persons successively, in the same manner, and for and on the same estates, interests, and trusts, as the land wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement." So that if before the money was invested or applied there was a devolution, that money would go as land. But it does not follow from that, as it seems to me, that when the money is invested or otherwise applied, then it is to go under this enactment as land, for this enactment does not apply to it except whilst it is in a particular state, that is, whilst remaining uninvested or unapplied. I should say that in sub-sect. 5 of sect. 22 the devolution, if the money devolves under such circumstances and whilst in such a condition, is expressly provided for. Then I turn to sect. 21, "capital money arising under this Act . . . shall, when received"—that is when it is in the hands of the trustee or in the hands of the Court, as the case may be, for then it is "received"—"be invested or otherwise applied wholly in one, or partly in one and partly in another or others of the following modes." Now we are just about to pass from the condition of things described in sect. 22 to the condition of things to be determined and to take place under the authority of sect. 21. Capital money shall, when received, be invested or otherwise applied as follows; first of all, "In investment on Government securities, or on other securities on which the trustees of the settlement are by the settlement or by law authorized to invest." We know that there are certain securities, which, although they are not mentioned in any power contained in the settlement, are by law securities in which trustees may invest. Then there are investments in Government

C. A. 1886

*In re* DUKE OF MARLBOROUGH'S SETTLEMENT. DUKE OF MARLBOROUGH *v.* MARJORIBANKS.

Lord Esher, M.R.

securities, and there are other securities which I need not mention. If the money is invested in Government securities, or in any securities in which by the settlement, or in any securities in which by law trustees may invest, there is nothing in sect. 21 which speaks of the mode in which that new investment, that new or altered property, is to devolve. It would devolve according to its nature, unless there is something in the Act to prevent it; and in this section there is nothing to prevent it. It is very remarkable that whilst the money was uninvested, whilst it was in the hands of the Court or of the trustees, before it is dealt with under sect. 21, the devolution is directed in a particular way, not according to its then nature: but the moment that it is to be invested under sect. 21 there is no intimation at all, and it is left to devolve according to its nature, according to law. Now that first sub-section is entirely as to investment. What is the second sub-section? The money may be applied, "In discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land." If the money may be applied in discharge of incumbrances, what becomes of the money? It is gone. When the incumbrance is gone, the money is gone; but the estate is left free. The estate would devolve unencumbered according to its nature, and according to the settlement under which it is comprised. With regard to the discharge of incumbrances, it seems to me that that is allowed by sub-sect. 2; and the moment it is allowed, there is nothing more to be said about it. The heirloom is gone, the money is gone; but the estate to which the heirlooms were attached, and the estate which is to go into the hands of the person who would have had the heirlooms, is left to devolve without any restriction according to its settlement and according to the law which may affect that settlement. By sub-sect. 3 the money may be applied "in payment for any improvement authorized by this Act;" if it were to be laid out in improvements, the way in which it may be so laid out is not purely at the will of the tenant for life, but improvements are to be paid for or carried out under sects. 25 and 26. By sect. 25, "Improvements authorized by this Act are the making, or execution on, or in connection with, and for the benefit of settled land, of any of the following works;" and there are many

C. A. 1886

*In re* DUKE OF MARLBOROUGH'S SETTLEMENT. DUKE OF MARLBOROUGH *v.* MARJORIBANKS.

Lord Esher, M.R.

drainage and other works which agricultural people well understand, as to which the moment that they are done, the money is gone, the heirloom is gone, but the estate remains, the estate is improved. Then the estate must go according to its nature and according to law. But there is a bridle on this question of improvements. By sect. 26, "Where the tenant for life is desirous that capital money arising under this Act"—that is, the proceeds of the sale of heirlooms, amongst other things—"shall be applied in or towards payment for an improvement authorized by this Act, he may submit for approval to the trustees of the settlement, or to the Court, as the case may require, a scheme." So far as the improvements go, it must be on a scheme submitted, according to the nature of the work to be done, either to the trustees or to the Court; so that he has not his own unbridled will to follow. It seems to me that unless there is something in the Act to the contrary, money which represents the proceeds of a sale of heirlooms—a sale authorized by the Court, which, therefore, cannot be a reckless sale—may be dealt with under sect. 21; and if it is dealt with under sect. 21, either in investments or in discharging incumbrances, the money is gone and that which is placed there instead of the money devolves according to its nature and according to law, and if the money is expended in improvements under the scheme the same effect would follow; it would be absorbed into the property in some of these cases, and then the property would go according to the settlement.

Against that it was said that sect. 53 would interfere with this view of the matter. Sect. 53 is: "A tenant for life shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement; and shall, in relation to the exercise thereof by him, be deemed to be in the position, and to have the duties and liabilities of a trustee for those parties." It is obvious that if the tenant for life is a trustee, he must act with good faith; but if he is to consider the interests of all parties, I cannot understand that his trusteeship will prevent him from considering, having obtained the authority of the Court to sell the heirlooms, what is best to be done for the estate. The Court cannot say what is best to be done. That must be left to his honest discretion; and if he exercises an honest discretion

and he expends the money either in paying off incumbrances or in improving the estate, it seems to me that it is impossible to say that there can be a breach of trust. No doubt the result is that the devolution of the money and the condition of things are altered from what they would be as against the tenant in tail coming into possession under certain circumstances. Ought we to alter the ordinary construction of the Act because of that result? So far from it, I declare I think that it was intended that instead of keeping heirlooms unnecessarily whilst the estate perished, the heirlooms should cease to exist, if it were for the benefit of all that the heirlooms should cease and the estate should continue; and that the estate should thereby be improved. So far from its having been an oversight in the drafting of the Act, to my mind it is almost obvious that it was so intended by those who drew this clause.

I think, therefore, that the decision come to by Mr. Justice *Chitty* was right. I will say this, that after hearing the arguments, and after having gone through this Act step by step, in order to try and find out what is its meaning, I turn back to the judgment of Mr. Justice *Chitty* and I find that, without knowing it, I have followed exactly the steps which he has taken in his reasoning; and, therefore, I must say I agree with him in his judgment for the very same reasons which he himself has therein given.

LINDLEY, L.J.:—

So do I; and I need add little more. But there is one difficulty to which I will address myself, inasmuch as it was strongly relied upon by Sir *Henry James* in his argument before us. The language of sect. 37 of this Act is plain enough, and it expressly empowers a tenant for life to sell heirlooms, with the sanction of the Court. Now, it is a startling and new idea to any conveyancer that a tenant for life should be able to sell heirlooms; but nevertheless the power is created, and then the Act, having given to him authority to sell, goes on to say what is to be done with the money. It gives to him an option, subject to the control of the Court; and the option to my mind is by no means unimportant. Sub-sect. 2 of sect. 37 enacts: "The money arising

C. A. 1886 *In re* DUKE OF MARLBOROUGH'S SETTLEMENT. DUKE OF MARLBOROUGH *v.* MARJORIBANKS. Lindley, L.J.

by the sale shall be capital money arising under this Act, and shall be paid, invested, or applied and otherwise dealt with in like manner in all respects as by this Act directed with respect to other capital money arising under this Act, or may be invested in the purchase of other chattels, of the same or any other nature, which, when purchased, shall be settled and held on the same trusts, and shall devolve in the same manner as the chattels sold." Now there appears to me to be an indication, in giving that alternative, of an intention on the part of the Legislature to allow money arising from the sale of heirlooms, not only to be re-invested in chattels of a similar description, but to be applied in a totally different manner. Then when we follow out sects. 21 and 22, which shew in what manner capital money arising under the Act can be applied, we find a great variety of methods of applying it. In looking through sects. 21 and 22, it is plain to me that a distinction is drawn in those sections between an investment and what is called an "application" of the money. The difficulty which Sir *Henry James* pressed upon us and which arose under sub-sect. 5 of sect. 22, is a difficulty, which relates to what is to be done with the capital money whilst "invested" as distinguished from "applied;" and he argued that if the proceeds arising from the sale of an heirloom are invested in consols, they cannot be dealt with under sect. 22. There is a verbal difficulty arising from the language of the last part of sub-sect. 5 of sect. 22, which enacts as follows: "Capital money arising under this Act while remaining uninvested or unapplied, and securities on which an investment of any such capital money is made, shall, for all purposes of disposition, transmission, and devolution, be considered as land, and the same shall be held for and go to the same persons successively, in the same manner and for and on the same estates, interests, and trusts, as the land wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement." It is true that money arising from the sale of heirlooms is not money arising from the sale of land; and that last part of the clause therefore seems to me to be inoperative; but the effect is plain enough. Sub-sect. 7 goes on in this way: "Those securities may be converted into money, which shall be capital money arising under this Act."

Therefore whilst the money is invested—I am treating the word "invested" as distinct from the word "applied"—the investment remains, as it was before, personal estate. That is the solution of the difficulty; and it is not only a simple one, but quite in conformity with the whole of the theory and the details of this Act. But now we are asked to say that under this Act heirlooms cannot be applied in paying off incumbrances on the settled land. It appears to me that to hold that would be to fly in the teeth of the Act of Parliament. It is to enable tenants for life to exonerate settled estates from incumbrances by means of money arising out of the sale of heirlooms, that sect. 37 has been introduced into the Act.

As to sect. 53, the exercise of the powers under the statute will be valid, if the tenant for life acts honestly and *bonâ fide* and for the interests of those interested in the land, the tenant for life, the tenant in tail, and all who may come afterwards. No doubt, it is possible to conceive a case, in which a large sum of money, arising from the sale of heirlooms, may go one way and the settled land another; but it is quite possible, on the other hand, that that case may never happen. I cannot say that it is a breach of trust to do that which is apparently for the benefit of everybody interested. I cannot accede to that argument. It seems to me that the view taken by Mr. Justice *Chitty* is correct, and the appeal ought to be dismissed.

LOPES, L.J.:—

This is an application by the tenant for life of a settled estate, to apply the proceeds of the sale of certain heirlooms in discharge of incumbrances affecting the inheritance of settled land. The position of the tenant in tail no doubt will be materally affected, if the proceeds of the sale of these heirlooms are applied in the discharge of incumbrances affecting the inheritance of the settled land. If the heirlooms had not been sold, the tenant in tail on attaining twenty-one would have been absolutely entitled to them, subject to the interest of the tenant for life, and could have dealt with them as he pleased. If the proceeds of the sale of the heirlooms are applied in the manner proposed, the tenant in tail gets no benefit until he becomes tenant in tail in possession, or

C. A. 1886 *In re* DUKE OF MARLBOROUGH'S SETTLEMENT. DUKE OF MARLBOROUGH *v.* MARJORIBANKS. Lopes, L.J.

with the consent of the protector bars the entail. It is clear therefore that the tenant in tail is materially prejudiced by the exercise of the power contained in sect. 37. The question is whether the Legislature contemplated this, whether the Legislature contemplated what the effect on the tenant in tail would be by this alteration in the devolution of the property. I am inclined myself to think that the *Settled Land Act*, 1882, as originally framed, was not intended to apply to the case of heirlooms, and I arrive at that conclusion from the title of the Act, which is "An Act for facilitating sales, leases, and other dispositions of settled land, and for promoting the execution of improvements thereon." And it is very probable that the Act as originally framed not contemplating the dealing with heirlooms, this clause with regard to heirlooms was introduced at a subsequent stage of the bill, and the Act was not so completely revised afterwards as it might have been; however, we come back to the question, was the Legislature alive to the effect that sect. 37 would have upon the tenant in tail? I think that the Legislature was fully aware what the effect would be. I come to that conclusion from the words, which are used in the early part of sect. 37. That section sets out carefully the nature of the tenure of chattels. It recognises in distinct terms the difference between the tenure of chattels and that of land; and recognises, as it appears to me, the fact that the law of perpetuities prevents chattels or personalty being bound to the same extent and in the same way as land.

Again, if we look at sub-sect. 2 of sect. 37, it appears there that the Legislature recognises the difference, and recognises the nature of the tenure of chattels, because we find the words, "or may be invested in the purchase of other chattels, of the same or any other nature, which, when purchased, shall be settled and held on the same trusts"—and then come these material words—"and shall devolve in the same manner as the chattels sold;" and then there is the 3rd sub-section, that an order of the Court is to be obtained. I am clearly of opinion therefore that the Legislature contemplated what the effect of this provision would be with regard to the interests of the tenant in tail.

Now if the heirlooms are sold, the proceeds arising from the sale are to be capital money; and there seems little difficulty,

when it becomes capital money, in coming to the conclusion that it may be applied in the discharge of these incumbrances. Sect. 21 provides how capital money is to be dealt with; and sub-sect. 2 enacts that it may be invested or otherwise applied "in discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land." Sect. 22, about which something has been said, appears to me not to affect this case; it appears to me to apply only to the interval that elapses between the realization of the money and its permanent investment; it appears to me to apply only to what is done with it in the interval. But with regard to sub-sect. 5 of sect. 22, I agree with what has fallen from my Brother *Lindley*. I think that the meaning of that section is this, that the capital money while uninvested or unapplied is to bear upon it the impress of land, and to follow the devolution of land if it came from land; but I think the subsequent part of that section goes to this extent, that if it arises in any other way than from land, for instance, from chattels, then, during the interval it is to have upon it the impress of chattels, and is to follow the devolution of chattels. The words to which I refer are these: "Capital money arising under this Act, while remaining uninvested or unapplied, and securities on which an investment of any such capital money is made, shall, for all purposes of disposition, transmission, and devolution, be considered as land;" then it goes on, "and the same shall be held for, and go to the same persons successively, in the same manner, and for and on the same estates, interests, and trusts, as the land wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement." Therefore I take it that if the money arising from these heirlooms had been invested in the interval between their realization and subsequent application, it would have followed the devolution which originally belonged to them.

There is one other section of the Act to which I desire to refer, and about which I desire to express my opinion; and that is sect. 53. Sect. 53 of this Act was relied upon. It was said that the tenant for life, selling heirlooms and applying the proceeds in discharge of incumbrances, would not have a proper regard to the interests of all entitled under the settlement, and would not

C. A. 1886 *In re* DUKE OF MARLBOROUGH'S SETTLEMENT. DUKE OF MARLBOROUGH *v.* MARJORIBANKS. Lopes, L.J.

be doing his duty as trustee to the tenant in tail, as was intended, under that section. I do not take that view of the meaning of that section. I think that the meaning of that section is this: that the tenant for life is to be answerable for an improper or improvident exercise of the powers conferred upon him by the Act, in the same manner as if he were an actual trustee under the settlement, exercising similar powers, conferred upon him by that settlement. I believe that to be the true meaning of that section, and I think that its meaning cannot be carried further than that. If the money arising from these heirlooms is applied within the provisions of the Act, clearly there can be no breach of trust, and clearly the tenant for life cannot be responsible as trustee. On these grounds I think the decision of the Court below was right.

Solicitors: *Spencer Whitehead,* agent for *Milward & Co., Birmingham; Hunters, Gwatkin, & Haynes.*

J. E. H.

---

C. A. 1886 Feb. 13, 15.

## *In re* TERRY AND WHITE'S CONTRACT.

*Vendor and Purchaser—Conditions of Sale—Particulars—Deficiency of Quantity—Specific Performance—Compensation—Right to rescind.*

Certain hereditaments were put up for sale in lots by auction subject to certain conditions of sale. The following conditions of sale were material: "3. Each lot is believed and shall be taken to be correctly described as to quantity and otherwise . . . . and the respective purchasers . . . . shall be deemed to buy with full knowledge of the state and condition of the property as to repairs and otherwise, and no error, mis-statement, or mis-description shall annul the sale, nor shall any compensation be allowed in respect thereof. 6. Each purchaser shall send his objections and requisitions (if any) to or in respect of the title, and of all matters appearing upon the abstract or the particulars or conditions of sale, to . . . . the vendor's solicitors" within a limited time. "7. If any purchaser shall insist on any objection or requisition which the respective vendors shall be unable, or on the ground of expense or otherwise unwilling to answer, comply with, or remove, the respective vendors may . . . . at any time, and notwithstanding any intermediate or pending negotiations, proceedings, or litigation, annul the sale." Lot 3 consisted of buildings and land, and was stated in the particulars of sale to contain 4A. 3R. 37P., and to be let at annual rents amounting to £27. At the auction Lot 3 was sold, and a deposit was paid. The abstract of title having been delivered, the

purchaser by his requisitions objected that Lot 3 was much smaller in extent than was stated in the particulars, the deficiency amounting to an acre and a half, and the true acreage being 3A. 1R. 37P. The mis-statement in the particulars of sale as to the acreage was inserted innocently, and the rentals of the property comprised in Lot 3 were correctly stated. The purchaser claimed that the contract should be carried out with compensation: the vendor refused any compensation, but offered to annul the sale. The purchaser having refused to withdraw his requisition or to consent to the annulment of the sale, the vendor gave notice that in pursuance of the seventh condition she annulled the sale. The purchaser having taken out a summons under the *Vendor and Purchaser Act*, 1874, for specific performance with compensation:—

*Held*, that the vendor might lawfully annul the sale by virtue of the seventh condition, for the requisition as to the deficiency in the quantity was a requisition as to a matter appearing upon the particulars or conditions of sale within the meaning of the sixth condition.

By Lord *Esher*, M.R., and *Lindley*, L.J.:—That even without the sixth and seventh conditions, the purchaser would have been prevented by the third condition from obtaining specific performance with compensation.

By *Lopes*, L.J.:—That without the sixth and seventh conditions the purchaser would not have been prevented by the third condition from obtaining specific performance with compensation; for that condition applied only to trivial errors and not to a deficiency amounting to one-third in the quantity of the land purported to be sold.

*Whittemore* v. *Whittemore* (1) and *Cordingley* v. *Cheeseborough* (2) commented on.

SUMMONS under the *Vendor and Purchaser Act*, 1874.

Certain hereditaments situate in *Hampshire* were sold in lots by auction. Lot 3 was thus described in the particulars of sale: "All that comfortable, detached, freehold dwelling-house, with barn, stable, sheds, garden, small paddock, and a close of capital land with good pond therein, containing together 4A. 2R. 24P., situate at *North Warnborough*, in the occupation of Mr. *George White* the elder, as yearly tenant, at an annual rent of £20 . . . Also, the six-roomed cottage, with large front and back gardens and woodhouse adjoining, in all about 0A. 1R. 13P., in the occupation of *George White* the younger, as yearly tenant, at an annual rent of £7."

The lots were sold subject to the following conditions:—

"3. Each lot is believed and shall be taken to be correctly described as to quantity and otherwise, and is sold subject to all

(1) Law Rep. 8 Eq. 603. (2) 4 D. F. & J. 379.

C. A. 1886

*In re* TERRY AND WHITE'S CONTRACT.

chief, quit, and other rents and outgoings, and to all rights of way and water and other easements (if any) subsisting thereon, and to all leases, tenancies, and occupations, whether mentioned in the particulars or not, and to all claims of lessees, tenants, and occupiers, and the respective purchasers shall be satisfied with such evidence of the terms of the tenancies as the respective vendors may be able to adduce, and shall be deemed to buy with full knowledge of the state and condition of the property as to repairs and otherwise, and no error, mis-statement, or misdescription shall annul the sale, nor shall any compensation be allowed in respect thereof."

"6. Each purchaser shall send his objections and requisitions (if any) to or in respect of the title, and of all matters appearing upon the abstract or the particulars or conditions of sale to Messrs. *Lamb, Brooks, & Sherwood,* the vendor's solicitors, at their office at *Odiham,* within ten days from the delivery of the abstract, and in this respect time shall be of the essence of the contract, and in default of such objections and requisitions (if none), and subject only to such (if any), shall be deemed to have accepted the title.

"7. If any purchaser shall insist on any objection or requisition which the respective vendors shall be unable, or on the ground of expense or otherwise unwilling to answer, comply with, or remove, the respective vendors may, by notice in writing, signed by their solicitors, and given or sent by post to such purchaser or his solicitor, at any time and notwithstanding any intermediate or pending negotiations, proceedings, or litigation, annul the sale, and shall thereupon return such purchaser his deposit, but without any interest, costs, or other compensation."

*Augusta Terry* was the vendor of Lot 3. At the sale *J. White* became the purchaser of that lot for £555, and paid a deposit of £111. The abstract of title having been delivered by the vendor's solicitors, requisitions of title were made on behalf of the purchaser; and it was therein pointed out that Lot 3 was much smaller in extent than was stated in the particulars; the deficiency amounted to an acre and a half, and the true acreage was 3A. 1R. 37P., whereas the total acreage as stated in the particulars

was 4A. 3R. 37P. The mis-statement in the particulars as to the acreage was inserted innocently, and appeared to be the result of a clerical error committed in casting the quantities given in a deed of partition. The rent of the property comprised in Lot 3 was correctly stated in the particulars. By the requisitions and also in the correspondence which ensued between the solicitors of the parties, the purchaser claimed that the contract of sale should be carried out with compensation; the vendor's solicitors refused any compensation, and offered to annul the sale. The purchaser refused to withdraw his requisition or to consent to the annulment of the sale; he insisted that the property should be conveyed to him with compensation. The vendor's solicitors thereupon gave notice in writing to the purchaser that the vendor "being unwilling to answer, comply with, or remove the objections or requisitions stated and made by you to or in respect of the title and other matters appearing upon the abstract of title delivered pursuant to, and upon the particulars and conditions of sale incorporated in, a certain contract . . . entered into between you and the said *Augusta Terry* for the sale and purchase of" Lot 3, "she, the said *Augusta Terry*, in exercise of the power for that purpose reserved to her by the seventh condition of sale, hereby rescinds the said contract and annuls the sale to you of the aforesaid hereditaments, and we further give you notice that the said *Augusta Terry* is ready and willing, and hereby offers to repay to you the deposit money paid by you in accordance with the terms of the said contract." The vendor's solicitors together with this notice sent to the purchaser's solicitor a cheque for the sum of £111 in repayment of the deposit; but the purchaser's solicitor returned the cheque, and refused to recognise the vendor's right to annul the contract.

The summons above-mentioned was, thereupon, issued on behalf of the purchaser, and the application having been adjourned to be heard in Court, Vice-Chancellor *Bacon* was of opinion that the vendor could not annul the contract, and ordered that the purchaser should be allowed the sum of £172 10*s.* compensation for deficiency in quantity of land.

The vendor appealed, and the appeal came on for argument on the 13th of February, 1886.

C. A. 1886 *In re* TERRY AND WHITE'S CONTRACT.

*Barber*, Q.C., and *Russell Roberts*, for the vendor:—

Possibly the vendor cannot rely upon the third condition as depriving the purchaser of all compensation, for it may be that that condition applies only to trivial errors; and the mis-statement as to the quantity is not a trivial error. But the vendor is entitled to annul; for a *bonâ fide* mistake has been committed, and the existence of a mistake is a defence to proceedings for specific performance: *Webster* v. *Cecil* (1). It follows from *Cordingley* v. *Cheeseborough* (2), that the purchaser is not entitled to compensation. *In re Dames and Wood* (3) is directly in point: it shews that the vendor could lawfully annul the contract. The vendor is acting reasonably, and she ought not to be prevented from exercising the power to annul reserved to her: *Mawson* v. *Fletcher* (4): *Heppenstall* v. *Hose* (5). The parties ought to be held to the contract into which they have entered: *In re Arnold* (6); and by that contract the vendor is entitled to rescind.

*Romer*, Q.C., and *E. W. Byrne*, for the purchaser:—

A great distinction exists between the right of a vendor and the right of a purchaser to specific performance: when the vendor cannot convey all that he has contracted to sell, he cannot compel specific performance; but the purchaser can always insist on having all that the vendor can convey, with a compensation for the difference: *Fry* on Specific Performance (7). The vendor cannot rely upon *In re Arnold*, for in that case the purchaser sought to be discharged from his contract. *McKenzie* v. *Hesketh* (8) is an analogous case, and the decision is in point for the purchaser. He claims compensation on account of the defect in the quantity of the land sold, and in *Fry* on Specific Performance (9) it is laid down that "where there is a defect in the quantity of the estate, the principle on which the abatement is calculated is *primâ facie* acreage." These authorities will shew what the rule in equity is

(1) 30 Beav. 62.
(2) 8 Jur. (N.S.) 585, 755; 3 Giff. 496; 4 D. F. & J. 379.
(3) 29 Ch. D. 626.
(4) Law Rep. 6 Ch. 91.
(5) 51 L. T. (N.S.) 589; 33 W. R. 30.
(6) 14 Ch. D. 270.
(7) 2nd Ed., pars. 1222, 1223, pp. 532, 533.
(8) 7 Ch. D. 675.
(9) 2nd Ed., par. 1239, p. 539.

apart from the conditions. The third condition was intended to prevent claims for compensation only where the misdescription was trivial; it does not extend to such a case as the present, where the deficiency in quantity amounts to one-third of the whole property purporting to be comprised in the lot; in a case of this kind compensation ought to be given: *Portman* v. *Mill* (1); *Cordingley* v. *Cheeseborough* (2); *Whittemore* v. *Whittemore* (3). In the last of the cases just cited the application was made to the Court for compensation by a purchaser, and it was held by Vice-Chancellor *Malins* that he was entitled to it. Upwards of sixteen years has elapsed since the decision was pronounced, and the principles laid down in it have never been dissented from. If a purchaser is reasonably entitled to specific performance with compensation, the vendor is not entitled to annul the sale: if the third condition applies only to trivial errors, in the present case the purchaser is entitled to specific performance with compensation, the misdescription being very important. A vendor cannot annul the sale arbitrarily, even by virtue of a condition: *Duddell* v. *Simpson* (4); and without a condition he cannot under any circumstances annul the sale. Upon the true construction of the seventh condition it does not extend to claims for compensation. A condition of sale giving the vendor a right to rescind the contract in the event of his being unable or unwilling to comply with a purchaser's requisition, is not in general a proper condition: *Hardman* v. *Child* (5); and a condition giving in express terms the right to annul a sale cannot be enforced when the purchaser makes an objection which is reasonable: *In re Monckton and Gilzean* (6). For the vendor reliance has been placed upon *Mawson* v. *Fletcher* (7), and *In re Dames and Wood* (8); but the decisions in those cases are distinguishable, because the requisitions related to matters of title, and not to deficiencies in quantity. *Heppenstall* v. *Hose* (9) is not an authority in this Court, and ought to be overruled.

(1) 2 Russ. 570, 574.
(2) 4 D. F. & J. 379, 386.
(3) Law Rep. 8 Eq. 603.
(4) Ibid. 2 Ch. 102, 107.
(5) 28 Ch. D. 712.
(6) 27 Ch. D. 555.
(7) Law Rep. 6 Ch. 91.
(8) 27 Ch. D. 172; 29 Ch. D. 626.
(9) 51 L. T. (N.S.) 589; 33 W. R. 30.

C. A. 1886 *In re* TERRY AND WHITE'S CONTRACT.

*Barber*, in reply:—

The passages cited from *Fry* on Specific Performance (1), relate to cases where those entitled to limited interests have sold as if they were seised of an estate in fee simple in possession: they do not extend to cases where there is a deficiency in the quantity of land sold. The vendor in the present case has acted *bonâ fide* and in strict conformity with the terms of the contract.

1886. Feb. 15. LORD ESHER, M.R.:—

In this case there had been a purchase of certain property under certain conditions of sale at an auction. The purchaser had bidden for a certain lot, Lot 3, and it had been knocked down to him and therefore there was *primâ facie* an agreement between him and the vendor. The property was described in the particulars as consisting of 4A. 3R. 37P. It turned out that there had been a blunder, an innocent blunder, and that there was a serious overstatement of the quantity; the real quantity of acreage was about one-third less. This was pointed out by the purchaser to the vendor, and thereupon the vendor claiming to act under the conditions declined to treat the matter as a sale but to diminish the price which had been bid, that is, to diminish the price really by one-third, and she claimed to rescind the contract. She gave notice of rescission, not rescission by mutual consent, but claiming to exercise her right in opposition to that of the purchaser, and to rescind the contract by virtue of one of the conditions of sale. The case being heard before the Vice-Chancellor, he came to the conclusion, upon a summons by the purchaser against the vendor claiming specific performance and also a diminution in price for the purpose of setting the error right by compensation, that he ought to make an order refusing to allow the vendor to insist on the rescission of the contract, and granting specific performance to the purchaser with compensation in the sense of an abatement of price; and the question is whether we can agree with that decision.

This case gives occasion for me to make a statement with regard to the mode, in which I think that arguments very often

(1) 2nd Ed., pars. 1222, 1223, pp. 532, 533.

brought before us with regard to alleged differences between equity and common law ought to be treated. I believe that these arguments are based more upon phrases which have been used formerly in the Courts of Equity and in the Courts of Common Law than upon any real distinction. I doubt myself, although such a thing is suggested in the Judicature Act, 1873, sect. 25, sub-sect. 11, whether there are any principles of law which were differently affirmed in the old Court of Equity and the old Courts of Common Law. These Courts dealt with the same matters for the purpose of different remedies, and therefore were necessarily looking at the same matters from different points of view. But it has been often said that the rules of evidence in the Court of Equity were different from those in the Courts of Common Law, and that a different construction was put upon the same instrument; that the same instrument in the same words would be construed in one way in a Court of Equity and in another way in a Court of Common Law; and it has been said that that which in the one Court would have been deemed to be neither immoral nor dishonest, was in the other Court deemed to be both immoral and dishonest. Ever since I have been in this Court of Appeal, I have been trying to point out, not the differences, but the resemblances and the identities between law and equity, and I now protest against each and every one of those alleged doctrines. I protest most strongly that evidence was always the same in the Court of Equity as in the Courts of Common Law as to its effect in finding out the truth. What an absurdity it would be if the same evidence to prove a given fact, before one of two tribunals should be taken to prove it, and before the other tribunal should be taken not to prove it! The idea seems to me to be monstrous; and, as to a matter being called immoral and dishonest in one Court and moral and honest in another, if the law were so, I should consider it perfectly hateful that a man should be branded with fraud or with dishonesty according to the Court in which his adversary brought the suit. It seems to me to be equally absurd and ridiculous to suppose that the same words, in the same contract, should be held to have one meaning in a Court of Law and another in a Court of Equity.

C. A. 1886

*In re* TERRY AND WHITE'S CONTRACT.

Lord Esher, M.R.

Assuming what I have said to be correct, we have to deal now with this summons. Here is a contract of purchase and sale of real property at an auction, and there having arisen a mistake, an innocent mistake, what are the rights of the parties? Now I do not doubt that a Court of Equity would, if the mistake had been made by the vendor, as a general rule, though not always and invariably, have aided the purchaser to obtain specific performance, but giving compensation so as to make up for the mistake. If the mistake was so great as, in the opinion of the Court of Equity, to affect the whole substance and foundation of the contract, I believe that the Court would not have granted specific performance to the purchaser, but would have said that the contract was to be treated as if it had never existed. That was where there was not merely a large error, but where the error was so great as to go to the whole foundation and substance of the contract, so that it would be impossible to conceive that the parties ever would have entered into the contract if the mistake had not existed. But, where the vendor came for specific performance, and had made an error, I think that the Court of Equity never would grant him specific performance, if he had made a substantial error to the injury of the purchaser, and would have left him to any remedy which he might have by bringing an action on the contract. But it does not follow that the interpretation of the contract in the action, if the vendor had been left to bring his action at law, would have been different to the interpretation put upon the contract by the Court of Equity; the interpretation would have been precisely the same, but he could not get in a Court of Common Law a remedy by way of specific performance.

Vendors finding themselves in this difficulty, that they could not get specific performance, and could not rescind the contract of their own accord—one party to a contract not being allowed to rescind it without the consent of the other—but that the purchaser could get specific performance against them with a compensation to be settled by the Court, desired to protect themselves, and it was in order to protect themselves against that which would have been the law without conditions of sale, that conditions of sale were put in to meet that state of the law. Conditions of sale

are not always the same, they vary; some vendors may put in more stringent conditions of sale than others; but when the conditions of sale are put in, what are the rights of the parties? Why, the purchaser bids, knowing of those conditions of sale, and therefore agreeing to be bound by them; so that the conditions of sale are the agreement under which the purchaser bids and the vendor sells. Then, that is a contract, the conditions of sale forming part of the contract. How are they to be construed? To my mind they are to be construed in precisely the same manner in a Court of Law as in a Court of Equity. They are to be construed according to the ordinary interpretation of language as used in business, unless there is something in the contract or something in the subject-matter which obliges the Court—not which entitles the Court, but which obliges the Court—to read the language otherwise than in its ordinary sense.

Now, take that rule of interpretation, and apply it to the conditions before us. First of all, I will go to the third condition. "Each lot is believed"—that is only a statement as to the good faith of the vendor,—"and shall be taken to be"—that part of it is against the purchaser—"and shall be taken to be correctly described as to quantity and otherwise," and the respective purchasers shall be satisfied with certain evidence, "and shall be deemed to buy with full knowledge of the state and condition of the property as to repairs and otherwise, and no error, mis-statement, or misdescription shall annul the sale, nor shall any compensation be allowed in respect thereof." Now, let us construe that according to its ordinary meaning. It is meant to put the purchaser, if he does not choose to go and look at the land and have it measured according to the description,—which he might do, I presume,—to put him really in the condition of a man who has done so. He undertakes not that he will have full knowledge, but that he shall be "deemed to buy with full knowledge of the state and condition of the property as to repairs and otherwise. And no error, mis-statement or misdescription"—of what? it must be "of the property"—"shall annul the sale." That is what the purchaser has undertaken, in a condition which begins by saying that "each lot shall be taken to be correctly described as to quantity." It seems to me that if we construe that condition

C. A. 1886 *In re* TERRY AND WHITE'S CONTRACT. Lord Esher, M.R.

according to its plain meaning, it is a contract between the purchaser and the vendor that so far as the contract is concerned, no misdescription, honest misdescription, shall have any effect, or at least shall have any greater effect, than if the purchaser had gone to look at the land and bought the land on his own judgment; and, if he had, why then an innocent misdescription could have had no effect. It seems to me that the purchaser has therein contracted that if the contract is to go on, he shall not have any compensation for a misdescription of quantity.

But it does not follow that the contract is to go on; because if this were the only condition, the purchaser might have specific performance if he insisted upon it, but he would have to take it without compensation as it seems to me. If that third condition stood alone, there being a misdescription of the quantity, what would be the condition of the vendor? If the vendor desired to have specific performance, she could not get it, because the Court of Chancery, where there was a misdescription and a condition that the purchaser should not be compensated for the difference, would not break through its own rule, and give specific performance to the vendor without compensation. To my mind, the vendor could not obtain specific performance.

Now, that state of things did not sufficiently meet the difficulty which had always pressed upon vendors, and therefore another condition was introduced, and that in this case is the seventh condition. "If any purchaser shall insist on any objection or requisition which the vendor shall be unable, or, on the ground of expense or otherwise, unwilling to answer, comply with or remove . . . the vendor may by notice in writing signed by her solicitor and given or sent by post to such purchaser or his solicitor at any time, and notwithstanding any intermediate or pending negotiations, annul the sale." There a power is given to the vendor to annul the sale.

What are the objections or requisitions mentioned in the 7th condition, in respect of which under certain circumstances she may annul? Why, they are mentioned in the 6th condition: "Each purchaser shall send his objections and requisitions to or in respect of the title,"—that is one kind of requisition—"and of all matters appearing upon the abstract,"—that again goes to title,—"or the particulars or conditions of sale." What has the purchaser

done here? Why, he has sent in an objection to what appears on the particulars or conditions of sale, namely, an erroneous description of quantity. He has sent in an objection within these very terms; and they go beyond, and far beyond, an objection or a requisition in respect of the title and any matter appearing on the abstract. By what authority can we strike these words out? Neither a Court of Equity nor a Court of Common Law has any right to strike out that stipulation, which has been not merely put in by the vendor but also agreed to by the purchaser by reason of his bidding at the sale. It seems to me impossible to strike that out.

If that stipulation stands, what are the rights of the parties? The objection is not one which the vendor would be "unable to remove," it is not an objection on the ground of expense to the vendor; but it comes within the words "or otherwise," and the vendor may fairly say, that the error no doubt was made, but the price which the purchaser has bidden is not to be measured necessarily or even fairly by merely calculating the purchase money according to the quantity. There is an error of one-third in the quantity of a property which is not simply land, but which contains also buildings; and yet the decision of the Vice-Chancellor is that the compensation or diminution is to be measured by the difference in quantity. I think it not unreasonable, not unfair for the vendor to say that she does not like to diminish the price according to that measurement; and therefore, I think that honestly, and not unfairly to the purchaser, who has agreed to it, she may exercise under that condition of sale her right to rescind the sale, giving him back all that portion of the purchase money which he may have paid to her.

That being according to my view the construction of these conditions, I know of no authority, I know of no principle of law or of equity, which can alter this contract between the parties, and which can prevent the vendor, in spite of that agreement by the purchaser with her, from exercising that power which is plainly given to her by the conditions of sale. I think that she may rescind, and that she is not bound to perform the contract, deducting one-third of the price which he has agreed to pay her under an erroneous impression.

C. A. 1886 *In re* TERRY AND WHITE'S CONTRACT. Lord Esher, M.R.

Many cases were cited to us in which expressions have been used which were relied upon, as striking against the canon which I insist upon, and as saying that there might be a different construction of the same contract in a Court of Equity and in a Court of Law, or now in the same Court, according to the division before which the action is brought. It seems to me that that is an idea which cannot be entertained for a moment, and if that be so, there is nothing here to shew that the parties ought not to be bound by their contract. I do not think that any of the cases which were cited did really prove that assertion, which is so often made, that there was a different rule of construction of the same contract in a Court of Equity and in a Court of Common Law. I think that the Lord Chancellor in *Cordingley* v. *Cheeseborough* (1), pointed out that it was only in exercising a discretionary power that a Court of Equity seemed to depart from the true construction of the contract. It appears to me that he admitted that the contract, if the party was put to sue upon it in a Court of Common Law, would be construed in precisely the same way as in a Court of Equity; and that, although it would be construed in the same way, a Court of Equity was only acting in refusing or granting specific performance upon rules of the Court, which did not in any way really interfere with the construction of the contract. With regard to *Whittemore* v. *Whittemore* (2), if it did establish what it has been stated it does establish, all I say is that I should with great deference disagree with the decision in it, just as much as I disagree with the judgment of the Vice-Chancellor in this case; but I doubt whether *Whittemore* v. *Whittemore* cannot be explained. I do not think, with great deference to the learned Judge, that the judgment was very satisfactory; or if the judgment was very satisfactory, all I can say is that then somebody else must take a burden which is often thrown upon Judges, and that some reporter has not very satisfactorily reported what the Judge said. I believe myself that *Whittemore* v. *Whittemore* can be explained, so that if ever the same state of things again arises there may be the same decision. I do not think it is very material, but I say that, if that case does establish what it is asserted to have established, I should

(1) 4 D. F. & J. 379. (2) Law Rep. 8 Eq. 603.

venture to disagree with it, and say that I could not follow that decision.

Under these circumstances, I think that the appeal ought to be allowed, and that the purchaser of course must pay the costs of the litigation.

LINDLEY, L.J. :—

This is an appeal by a vendor against the order made by Vice-Chancellor *Bacon* on an application by a purchaser for a declaration, that he is entitled to an abatement from the purchase-money which he agreed to pay for a house and land in *Hampshire*. The particulars and conditions of sale, and the mistake giving rise to this unfortunate misunderstanding, have been stated by the Master of the Rolls, and I shall not repeat them: I shall take them as familiar to us all. Nor shall I refer in detail to the correspondence which took place before the litigation; I mean the letters which passed between the solicitors for the respective parties, and which shew the positions taken up by each of them. The purchaser from the first insisted upon compensation; the vendor as soon as the blunder was pointed out to her admitted it, but declined to make compensation, and insisted upon her right to rescind the contract under the conditions of sale. Under those circumstances the purchaser took out a summons under the *Vendor and Purchaser Act*, asking for a declaration that, notwithstanding the seventh condition, the vendor was not entitled to rescind the contract, that the purchaser was not precluded by the third condition or otherwise from objecting that the quantity of Lot 3, according to the title shewn in fact was 3A. 1R. 37P., whereas according to the particulars of sale, it was 4A. 3R. 37P., and that notwithstanding the third condition the purchaser was entitled to compensation.

Now, in all actions for specific performance, and in all applications to the Court involving the exercise of that discretion which the Court invariably does exercise in ordering or refusing specific performance, it is necessary not to confound the principles or rules by which contracts are interpreted, with the principles or rules which guide the Court in enforcing or declining to enforce specific performance.

C. A. 1886

*In re* TERRY AND WHITE'S CONTRACT.

Lindley, L.J.

I should not have thought it necessary to allude to so very obvious a caution, if some of the arguments addressed to the Court had not apparently called for it. For example, it was contended that such conditions as the third condition in this case only applied to comparatively trivial and unimportant errors, mis-statements and misdescriptions, and several cases were referred to in support of that proposition. But when those cases are carefully looked at they will not be found to warrant so general a statement. The proposition is only true in certain classes of cases. It certainly would be surprising if any authorities were found which required the Court to construe conditions of sale differently from other contracts, or to hold that they do not mean what their words, taken in their ordinary sense, would convey to the mind of an intelligent person. Conditions of sale, like all other contracts, must be construed with reference to the subject-matter to which they relate, and upon the assumption that the parties to them are dealing fairly with each other. Being deliberately prepared by the vendor, who knows much more of the subject-matter to which they relate than a purchaser usually knows, or can know, conditions of sale, where their language is at all ambiguous, or where the application of that language to the property sold gives rise to difficulty, are always construed or applied in such a way as to prevent the vendor from dealing unfairly with the purchaser. But the same observations are true of all other contracts similarly circumstanced. And I may here say that I quite agree with the Master of the Rolls; I know of no distinction between modes of interpreting contracts. The interpretation is and always has been precisely the same both at law and in equity.

The authorities, which are supposed to decide that condition No. 3 is only applicable to small matters, are divisible into two classes, namely, first, those in which the Court refused specific performance at the instance of the vendor, or proceeded on the principles applicable to actions by him for specific performance; and secondly, those in which the contract was set aside for fraud or misrepresentation. Where a vendor sues for specific performance, he will fail, however clear the terms of his contract, if the Court comes to the conclusion that he has acted in such a way as

to disentitle him to that particular form of relief. Notwithstanding such a condition as No. 3, the Court will not decree specific performance at the instance of the vendor if he has materially misled the purchaser; and it is well known that a less serious misleading is sufficient to enable a purchaser to resist specific performance than is required to enable him to rescind the contract. *Portman* v. *Mill* (1) was a vendor's action, and Lord *Eldon's* observations must be taken with reference to such actions. *Whittemore* v. *Whittemore* (2) was a case in which the purchaser did not seek specific performance, but, on the contrary, resisted it unless compensation was made. The same principles were applicable in that case as would have been applicable if the vendor had sought to enforce the contract. Had the purchaser sought to enforce it, and had the Court decided in his favour, the decision, in my opinion, would have been wrong; but I do not think it was wrong under the circumstances with which the Court was dealing. There are other cases in the books illustrating the same principle, but to which it is useless to refer.

Again, however clear a contract may be in its language, it may be rescinded for fraud or material misrepresentation; and cases are reported in which contracts for the sale of land have been rescinded on this ground, although one of the conditions was that no error or mis-statement should annul the sale, but should be the subject of compensation. In such cases the fraud or misrepresentation, if sufficiently serious, vitiates the whole contract, including the condition in question: *Dimmock* v. *Hallett* (3) is an instance of this. In that case Lord Justice *Turner* observed (4) that such a condition as No. 3 applied to accidental slips, and not to misrepresentations calculated materially to mislead the purchaser, but it is obvious from his judgment and that of Lord *Cairns* that the decision was based upon the ground that the whole contract was vitiated and ought to be set aside; and, the relief sought by the purchaser in that case was to be discharged from the contract, and not to enforce it. In the present case the purchaser not only does not seek to be discharged from the contract, but he insists on his right to take the property at a

(1) 2 Russ. 570.
(2) Law Rep. 8 Eq. 603.
(3) Law Rep. 2 Ch. 21.
(4) Ibid. 29.

C. A. 1886

*In re* TERRY AND WHITE'S CONTRACT.

Lindley, L.J.

price less than the contract price. It may be that he would be entitled to do so if the terms of the contract were different from those to which he has in fact agreed. The question is whether he can do so consistently with those terms. In my opinion he cannot. The third condition alone appears to me fatal to such a contention. I cannot construe that condition as confined to trivial errors, or as not in terms applying to the error made in this case. Moreover, it appears to me that, if the third condition were not fatal to the purchaser, still the sixth and seventh clearly would entitle the vendor to rescind the contract. I see no justification for saying that they do not apply to this case. The purchaser objects to complete, except at a reduction of price; the vendor objects, not *malâ fide* or without reason, but *bonâ fide*, because if she assents she will be selling the property at less than its value. Her right to rescind under these circumstances cannot, I think, be denied, without violating the terms of her contract and the principles laid down in *In re Dames and Wood* (1).

In coming to this conclusion, I have proceeded on reason rather than on authority; but if authority in addition to reason be required, it is to be found in *Cordingley* v. *Cheeseborough* (2). It is a case very similar to this. In that case the correct principles applicable where a purchaser insists on specific performance with compensation, when there are conditions against it, will be found laid down not only in the judgments of the Vice-Chancellor *Stuart* and Lord *Westbury*, but also in the opinion given by Mr. *Dart*, and set out in 3 Giff. at p. 501. That opinion appears to me to be so valuable and so applicable to the present case that, notwithstanding the slight variation in the terms of the conditions, I propose to read it as part of my judgment. Mr. *Dart* "was of opinion that the seventeenth condition" — that is the clause about compensation — "was applicable so far, that it clearly precluded the purchaser from insisting upon specific performance with a compensation for the deficiency in the quantity; but his opinion was, that the vendor would not himself have been able to enforce specific performance without allowing compensation. He also thought that the purchaser, by insisting

(1) 29 Ch. D. 626. (2) 3 Giff. 496; 4 D. F. & J. 379.

on specific performance with compensation, was making a requisition which was unfounded within the meaning of the tenth condition"—that was the rescission condition—"and that the vendor was entitled to rescind the contract." Then he makes some observations about costs, with which I also entirely agree. Now, no doubt Lord *Westbury* in one passage seems to have some doubt about the interpretation of the condition in that case which answers to condition three here, condition seventeen in that case. He says (1): "I am not inclined to rest this case upon the interpretation of the seventeenth condition, because I think, although it is unnecessary to decide the matter, that the fair interpretation of a condition of this kind must be that it is intended to apply to unintentional errors, and that it is also intended to cover the consequences of inconsiderable errors." Then he goes on to say, "I should therefore hesitate to hold, if this were a suit for specific performance on the part of the vendor, that he would be entitled to insist upon a specific performance against the purchaser, and compel him to take something that was little more than one half of the quantity which he had a right to expect." Now, I take it there can be no doubt whatever that the vendor here would sue in vain for specific performance without compensation; but that is quite a different thing from saying that the purchaser is entitled to insist upon specific performance without paying the price contracted for. In my opinion the vendor in this case has been right ever since her attention was called to the blunder in the particulars, and the purchaser has been wrong in insisting on specific performance at a reduced price. The appeal, therefore, ought to be allowed, and the purchaser ought to pay the costs, both here and below.

LOPES, L.J.:—

In this case the purchaser asks for specific performance with compensation for a certain deficiency in quantity. The vendor, on the other hand, seeks to annul the sale, relying on certain conditions of sale. In the particulars and conditions of sale, Lot 3 was represented to contain 4A. 3R. 37P., whereas it was after the sale discovered to contain only 3A. 1R. 37P. The rent was

(1) 4 D. F. & J. 386.

C. A. 1886

*In re* TERRY AND WHITE'S CONTRACT.

Lopes, L.J.

correctly stated in the particulars. The Vice-Chancellor granted specific performance, and awarded £172 10*s.* compensation to the purchaser.

The purchaser, within the time required by the conditions, objected to this deficiency in quantity, and insisted on his objection: whereupon the vendor relying on the conditions of sale claimed to annul the contract. The question, therefore, raised in this case is this: is the vendor entitled to annul the contract according to the true construction of these conditions, or is the purchaser entitled to specific performance with compensation? In the absence of any conditions or contract to the contrary, it is a general principle that the purchaser can insist on having all that the vendor can convey, with compensation for deficiency if there should turn out to be any. The vendor's case, therefore, here, must of necessity rest entirely upon the terms of these conditions. In point of fact the vendor relies first on the third condition, and she says that precludes the purchaser from having any compensation for this deficiency. With regard to conditions of sale, they are incorporated in the agreement between the parties, and must be interpreted according to their true meaning like any other contract. I do not agree with the opinion which has been expressed by the other members of the Court with regard to the meaning of the third condition. The important words are these, "each lot is believed and shall be taken to be correctly described as to quantity and otherwise," and the respective purchasers shall be satisfied with certain evidence, and "shall be deemed to buy with full knowledge of the state and condition of the property as to repairs and otherwise, and no error, mis-statement, or misdescription shall annul the sale, nor shall any compensation be allowed in respect thereof." The vendor says, "This condition precludes you, the purchaser, from obtaining compensation for the deficiency." The purchaser, on the other hand, says: "This is not the true meaning of the condition. It was never intended to apply to great and substantial deficiencies in quantity, such as there are in this case, but only to inconsiderable deficiencies." I am inclined to think that that is the true meaning of the condition. If it is not the true meaning, then, although there might be a deficiency amounting

to one half the property, the purchaser would not be enabled either to claim compensation or to annul the sale. I can only read this condition according to the words which are in it; and if it is pushed to its logical results that is the effect which it would have. I am inclined therefore to agree with the opinion, which was expressed with regard to a similar condition in the case of *Whittemore* v. *Whittemore* (1), which has been already referred to, and in the case of *Cordingley* v. *Cheeseborough* (2)—I believe it is a general principle which has always been applied to conditions of this kind—that the Court is willing to put a liberal and comprehensive construction upon conditions which give compensation to a purchaser, and a strict interpretation upon any which limit his right to it.

The case of *Whittemore* v. *Whittemore* may be shortly stated in this way, and it seems to me to be in point, if it is good law. Where land was described in the particulars as containing 753 square yards, whereas it actually contains only 573 square yards, and one of the conditions provided that if any error, misstatement, or omission in the particulars should be discovered, the same should not annul the sale, nor should any compensation be allowed by the vendor or purchaser in respect thereof, it was held by Vice-Chancellor *Malins* that such a condition must be construed as intended to cover small unintentional errors and inaccuracies, and not to cover reckless and careless statements; and that so large a deficiency as 180 square yards out of 753 did not come within the condition, and that the purchaser was therefore entitled to compensation. If, therefore, that was the only matter we had to consider in this case, speaking for myself, I should come to the conclusion that so far as the third condition is concerned, the purchaser in this case was not precluded from claiming and obtaining compensation.

But I now come to two other conditions; they are the sixth and seventh conditions; I do not think it necessary to read them, because they have been already fully gone into. According to my view, those conditions clearly entitle the vendor to annul. It is said by the purchaser that those conditions only had reference to what may be called pure requisitions, that is, objections or

(1) Law Rep. 8 Eq. 603. (2) 4 D. F. & J. 379.

C. A. 1886 *In re* TERRY AND WHITE'S CONTRACT. Lopes, L.J.

requisitions in respect to title. I cannot adopt that view, because I find in condition six these very cogent and significant words: "Each purchaser shall send in his objections and requisitions to or in respect of the title and of all matters appearing upon the abstract," then it goes on "or on the particulars or conditions of sale." The objection taken here was essentially an objection to that which appeared upon the particulars. It was an objection to the quantity which is set out in those particulars, and I think, therefore, that this case is clearly covered by that condition, and that the vendor is entitled to annul.

It was said during the course of the case that a vendor would not be justified in arbitrarily or unreasonably taking advantage of such a condition as this. That, no doubt, is the case, but can it be said to be unreasonable for the vendor in this case to say "I will not forego £172 10*s.* out of the £555 which I was to receive for my property because I inadvertently made a mistake as to acreage, which did not affect the value, and if you insist on your objection, I elect, on the ground of loss to me, to annul the sale?" I think it was quite reasonable on the part of the vendor to take that course, and I think, therefore, that the appeal ought to be allowed.

Solicitors for the vendor: *Johnson & Weatherall*, agents for *Lamb, Brooks, & Sherwood, Odiham.*

Solicitors for the purchaser: *Elliott & Ash.*

J. E. H.

## *In re* RICE, A PERSON OF UNSOUND MIND.

C. A.
1886
March 1.

*Practice—Proof of Deed—Common Law Procedure Act*, 1854 (17 & 18 *Vict.* c. 125), s. 26 [*Revised Ed. Statutes, vol. xii., p.* 415].

An appointment of new trustees, not required to be by deed or to be attested, was made by deed, executed abroad by the donee of the power, who was resident abroad, and his execution of it was attested by a witness, also resident abroad. A vesting order was then applied for, one of the old trustees being of unsound mind, and was supported by proof of the handwriting of the signature of the appointor to the deed :—

*Held*, that the petitioners must prove the handwriting of the attesting witness, or, failing that, must shew that they had endeavoured to find a witness in *England* who could speak to his handwriting, and failed in doing so, in which case the order might be drawn up on proof of the handwriting of the appointor.

UNDER a settlement the tenant for life had a power of appointing by any writing under his hand a new trustee or trustees in the room of a trustee or trustees dying or becoming incapable to act.

One of the three trustees having died, and another, *M. W. Rice*, being of unsound mind, the donee of the power in November, 1885, appointed new trustees in their room. The donee was resident in *Portugal*, and made the appointment there by deed executed in the presence of and attested by a witness also resident there. The beneficiaries, the continuing trustee, and the new trustees, then presented a petition for a vesting order, and the order was pronounced by the Court of Appeal on the 8th of February. The deed of appointment was verified by proof of the handwriting of the appointor, but the Registrar declined to draw up the order on this evidence without the direction of the Court.

*Ingle Joyce* now applied for such direction. The case is within the *Common Law Procedure Act*, 1854 (17 & 18 Vict. c. 125), s. 26, attestation not being requisite to the validity of the instrument, and it not being even necessary that it should be a deed. *In re Reay's Estate* (1) is against me; but *Re Mair's Estate* (2), which is a later case, is precisely in point, and is in my favour.

(1) 1 Jur. (N.S.) 222; 3 W. R. 312. (2) 21 W. R. 749.

C. A.
1886
*In re* RICE, A PERSON OF UNSOUND MIND.

COTTON, L.J.:—

It is not desirable to depart unnecessarily from an established practice. In petitions in Lunacy and in Chancery it has been usual since the Act to require proof by the attesting witness. If he is abroad it will be enough to prove his handwriting, and if you shew by affidavit that you have endeavoured to obtain a witness in *England* who can speak to his handwriting, and have failed, the order may be drawn up on your present evidence.

FRY, L.J., concurred.

Solicitors: *Wing & Ducane.*

H. C. J.

---

C. A.
1886
*Feb.* 24;
*March* 10, 24.

## *In re* ALLINGHAM.

[1886 A. 47.]

*Solicitor—Taxation of Bill—Bankruptcy*—6 & 7 *Vict. c.* 73, *ss.* 37, 38, 39 [*Revised Ed. Statutes, vol. ix., pp.* 128–131].

The trustee in bankruptcy of a mortgagor held entitled to an order to tax, under 6 & 7 Vict. c. 73, the bill of costs of the solicitor of the mortgagee incurred in selling the property under a power of sale.

*In re Marsh* (1) distinguished.

ON the 5th of June, 1885, Mr. *Buckley*, who held a mortgage for £500 on property of Mrs. *Smith*, put up the property for sale by auction, and it was sold for £650. Mr. *Allingham* acted as solicitor for *Buckley* in the transaction, and received the purchase-money.

On the 23rd of August, 1885, Mrs. *Smith* was adjudicated bankrupt, and on the 3rd of September, *Collins* was appointed trustee. After his appointment he applied to *Allingham* for an account of the way in which the £650 had been disposed of, and an account was rendered, shewing that *Allingham* had retained out of it a bill of costs amounting to £43 18*s.* 6*d.*, in respect of the sale. It appeared that there was a second mortgagee who would be entitled to the surplus proceeds of sale. *Collins*, in

(1) 15 Q. B. D. 340.

January, 1886, took out a summons to tax this bill. The summons came before Mr. Justice *Pearson* in Chambers, when the solicitor relied on *In re Marsh* (1) as establishing that a trustee in bankruptcy could not obtain an order to tax under 6 & 7 Vict. c. 73. Mr. Justice *Pearson* considered that he was bound by the observation of the Master of the Rolls that the trustee could not obtain an order to tax, and refused the application. *Collins* appealed.

Feb. 24. *Ellis Davis*, for the Appellant :—

Mr. Justice *Pearson* did not go into the merits, but went on the point that the trustee was not competent to apply, which he considered to be decided by *In re Marsh*. But that was a case of business done by a solicitor for the trustee in bankruptcy, and therefore quite different from the present. The observation of the Master of the Rolls must be construed with reference to the case before him, and has no bearing on the present.

*Onslow, contrà* :—

The trustee of the mortgagor is not a party liable for the bill within the meaning of the third party clause : *In re Leadbitter* (2) ; and, as the Master of the Rolls laid down in *In re Marsh*, he is not mentioned in any of the sections of the Act as a person entitled to apply to tax. This is a paid bill ; special circumstances and overcharges must therefore be shewn before an order to tax is made, and none have been shewn.

[THE COURT considered that, under special circumstances into which it is needless to enter, it was right to allow an opportunity of giving evidence of special circumstances and overcharge ; and the case stood over.]

March 10. *Ellis Davis*, for the Appellant.

*Onslow, contrà* :—

I say that the trustee has no *locus standi*. He has no interest in the question, nothing can possibly come to him, for there is a second mortgagee who is entitled to any surplus proceeds, and

(1) 15 Q. B. D. 340. (2) 10 Ch. D. 388.

C. A. 1886 *In re* ALLINGHAM.

therefore this is an application merely for the benefit of the second mortgagee, who does not come forward on his own behalf. By the Act a person who comes to tax must be liable to pay, or interested in the property out of which the payment is to be made, and the Appellant satisfies neither condition. Then this bill was paid by *Buckley*, and there are no special circumstances.

---

THE COURT not being satisfied on the materials before it that the bill had been paid, the case stood over again that this point might be investigated. It turned out that there had not been any such settlement of accounts between *Buckley* and the solicitor as to entitle the latter to say that the bill had been paid.

The case was in the paper again on the 24th of March.

COTTON, L.J. :—

This is an application by the trustee in bankruptcy of a mortgagor to tax the bill of the solicitor who acted for the mortgagee in effecting a sale of the mortgaged property, the amount of which bill he has retained out of the proceeds of sale. Mr. Justice *Pearson* considered himself bound by *In re Marsh* (1) to hold that the taxation must be in bankruptcy and not under 6 & 7 Vict. c. 73. In this we think that he was in error. The bill is for business not in any way connected with the bankruptcy of the mortgagor. That mortgagor having become bankrupt her trustee has the same right to tax as she would have had if there had been no bankruptcy. *In re Marsh* related to business done by a solicitor for the trustee as such, and has no bearing on the case. An order for taxation must therefore be made.

BOWEN and FRY, L.JJ., concurred.

Solicitors: *R. Raphael; Allingham.*

(1) 15 Q. B. D. 340.

H. C. J.

## *In re* TUER'S WILL TRUSTS.

C. A. 1886 March 24, 31.

*Chancery Division—Jurisdiction—Person of Unsound Mind not so found—Maintenance.*

The jurisdiction of the Chancery Division to give directions as to the maintenance of a person of unsound mind not so found is not confined to applying the income for his maintenance, but extends to the application of capital for that purpose.

*JOSEPH TAFT TUER*, aged forty-eight, was a person of unsound mind not so found by inquisition, and was wholly incapable of managing his affairs. His only property was a sum of £878 10*s.* 11*d.* consols, arising from the residuary estate of his father, which had been paid into Court under the Act for the relief of trustees.

The brother of *J. T. Tuer*, as his next friend, took out a summons on his behalf, asking that £100 per annum might be allowed for the maintenance and clothing of *J. T. Tuer*, and might be paid to the brother out of the dividends of the stock as far as they would extend, and the remainder by sale from time to time of a sufficient part of the stock, the brother undertaking to maintain and support *J. T. Tuer* out of his own moneys when the stock was exhausted.

Vice-Chancellor *Bacon* doubted whether he had any jurisdiction to order capital belonging to a person of unsound mind to be applied for his maintenance, and refused the application, which was renewed before the Court of Appeal.

March 24. *Hemming*, Q.C., and *Fryer*, for the application:—

We say that the jurisdiction is the same in the case of a person of unsound mind not so found, as in the case of an infant, the reason being the same in the one case as in the other. *Vane* v. *Vane* (1) shews that the Court has original jurisdiction as to maintenance in such a case, and there is no ground for holding that it cannot be exercised to the same extent as in the case of an infant. *In re Brandon's Trusts* (2) goes to the extent of

(1) 2 Ch. D. 124. (2) 13 Ch. D. 773.

C. A. 1886 *In re* TUBB'S WILL TRUSTS.

what we ask. *In re Bligh* (1) is not opposed to this, for though the Lord Justice *Cotton* used an expression which seems to denote that the Court cannot go beyond applying the income, it is evident that the distinction between applying income and capital was not under consideration, the observation being only directed to the want of jurisdiction to appoint a guardian.

COTTON, L.J.:—

I entertain no doubt that a Judge of the Chancery Division has jurisdiction to make such an order as is now asked for; but when it is asked to employ capital in maintenance, the jurisdiction is to be exercised with caution. The application may stand over till this day week, and the brother must attend before us on that day, that the circumstances may be fully considered.

BOWEN and FRY, L.JJ., concurred.

March 31. The brother attended on this day, and the order was made, the brother undertaking to apply the £100 a year for the maintenance of his imbecile brother, and also giving the undertaking proposed by the summons.

Solicitors: *Blake, Snow, & Nephew.*

(1) 12 Ch. D. 364.

H. C. J.

## GOOCH *v.* LONDON BANKING ASSOCIATION.

[1885 G. 1491.]

C. A.
1885
PEARSON, J.
*July* 24.
C. A.
1886
*Jan.* 20, 22.

*Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 133, *sub-s.* 1 [*Revised Ed. Statutes, vol. xiv., p.* 231]—*Voluntary Winding-up—Future Liabilities—Lease.*

An injunction was granted, on motion by the lessor, to restrain a company in voluntary liquidation from distributing assets among its shareholders without setting aside sufficient assets to provide for future rent and other liabilities under a lease. An appeal from this decision was compromised.

THE *London Banking Association, Limited*, was in course of being wound up voluntarily, all the debts of the association had been paid and all their liabilities satisfied except their liability for future rent and the performance of the covenants under a lease of 57, *Old Broad Street*, the premises where the association had carried on their business.

The lease was granted by *Julius Spencer Morgan*, the then freeholder, to the association, in April, 1875, for a term of ninety-nine years, from the 29th of September, 1874, at the annual rent of £2475. The lease contained a covenant on the part of the lessees not to assign without a license from the lessor, with a proviso that the license should be granted to the lessees on their producing a proper assignee or joint assignees.

There was in the hands of the liquidators a large balance, which it was intended to distribute among the shareholders. The Plaintiff was the grantee from *Julius Spencer Morgan*, of the reversion of No. 57, *Old Broad Street*. The Defendants were the association and its liquidators. The Plaintiff claimed a declaration that the liability of the association under the lease ought to be properly provided for before its assets were distributed amongst its shareholders, and for an injunction to restrain such distribution of assets. This was a motion for an interim injunction till the hearing. It was undisputed that the annual value of the property at the present time was materially less than the rent reserved.

The motion was heard before Mr. Justice *Pearson* on the 24th of July, 1885.

C. A.
1886
GOOCH
v.
LONDON
BANKING
ASSOCIATION.

*Cozens-Hardy*, Q.C., and *Stirling*, for the Plaintiff:—

The principle of providing for liabilities which may ripen into debts under a lease is recognised where a company's capital is reduced: *In re Telegraph Construction Company* (1). Still more is it necessary to make such provision before all the assets are parted with in a voluntary winding-up, and there is authority for the very order that is asked: *Oppenheimer* v. *British and Foreign Exchange and Investment Bank* (2).

The same principle was applied in restraining the trustees of an insurance company, at the instance of a policy-holder, from parting with the funds of the company to a purchasing company: *Kearns* v. *Leaf* (3).

*Everitt*, Q.C., and *H. B. Buckley*, for the Defendants:—

The case of *In re Telegraph Construction Company* has no application to this. The order there was made simply in accordance with an Act of Parliament; except under that Act of Parliament the company had no power to reduce their capital; here it is not intended to reduce the capital, the capital will still be available, if necessary, by means of calls to meet any liability that may arise. Nor is the case of *Oppenheimer* v. *British and Foreign Exchange and Investment Bank* any authority for the Plaintiff's contention. In that case it was agreed between the parties that a sum should be set apart, and the only question before the Court was what sum should be set aside.

It has always been held that contingent liabilities of this kind are not to be provided for till they ripen into actual debts. The whole of the assets will be divided among creditors *in præsenti* without putting aside anything for future rent: *In re Haytor Granite Company* (4); *Horsey's Claim* (5). The lessor will merely be allowed to enter a claim, so that prevents his being injured by dissolution: *In re Gartness Iron Company* (6). The law on the subject is the application of the doctrine in *King* v. *Malcott* (7), namely that the Court will not interfere to give the lessor more

(1) Law Rep. 10 Eq. 384.
(2) 6 Ch. D. 744.
(3) 1 H. & M. 681.
(4) Law Rep. 1 Ch. 77.
(5) Ibid. 5 Eq. 561.
(6) Ibid. 10 Eq. 412.
(7) 9 Hare, 692.

than he bargained for, leaving him to his strict legal right under his contract. A going company has a right to curtail its business and return a part of the capital to its shareholders subject to their liability to have it called up again. The case of a voluntary winding-up is exactly the same, and no injury would happen to the lessor, for the company would not be dissolved without notice to him, or while his claim was admitted as a claim, and if occasion require the calls can be made.

*Cozens-Hardy*, in reply:—

We admit that a lessor cannot stop distribution of assets among creditors *in præsenti*. The fallacy of the argument on the other side is, that it is based on principles which do not apply to a registered company, the creature of statute law. The winding-up is regulated by statute, and sect. 133 of the *Companies Act*, 1862, provides that in a voluntary winding-up all liabilities are to be satisfied before any assets are distributed among shareholders.

PEARSON, J.:—

No doubt this is a very serious case, and it has not been argued at all more seriously than it deserves to be argued. If I were to decide it upon what Vice-Chancellor *James* called, in *In re Telegraph Construction Company* (1), "common justice and common sense," I should have no difficulty in determining it. But I am told that whatever may be the proper view of the case according to common justice and common sense, the law is against me, and I must decide the case according to law, and in opposition to common justice and common sense. Let me consider whether I am in that painful position, because if I am, I admit that I am bound by the common law of the land, and I cannot depart from it. [His Lordship stated the facts, and proceeded:—] I say again, the motion seems to me so reasonable, that had I nothing to do but to consider whether it was reasonable or not, I should, without hesitation, say it was a motion that ought to be granted.

But it is argued on behalf of the Defendants, the bank, that the Court has no authority whatever to grant such an application

(1) Law Rep. 10 Eq. 384.

C. A. 1886 GOOCH v. LONDON BANKING ASSOCIATION. Pearson, J.

as this; that the lessor is completely without remedy in reference to the distribution of the assets of the company by the liquidators amongst the shareholders; and that he has not and cannot have any lien upon those assets; that the liquidators will therefore be perfectly within their rights in distributing those assets amongst the shareholders, and that the shareholders would have a just right of complaint if their money were locked up in any way to provide for the payment of this rent, and if they were not allowed to receive it at once and to make such use of it as they please.

It is admitted by counsel for the bank that any order which I may make, either refusing this motion or not, will not in any way discharge the bank from their liability to pay this rent; they say that so long as the rent remains due from the bank, that is to say, until either the lessor has put an end to the lease, or until, according to the covenants in the lease, the lease has been assigned so as to release the bank from any liability to pay future rent to the lessors, there can be no dissolution of the company, and so long as there is no dissolution of the company the lessor has all rights which he can claim. If the rent is paid, no claim arises: if the rent is not paid, he is then entitled to go in under the winding-up and to ask the liquidators to pay the rent, and if the liquidators, having parted with the assets, are without funds to pay that rent, it will then be the duty of the liquidators to make calls upon the shareholders in order to put themselves in funds to discharge the rent. But one way or another, the lessor must be paid his rent, that the bank do not dispute. They say if the lessor has this right, then he has everything which he is entitled to, everything which he bargained for when he made this contract and demised the premises. On the other hand it is said, and it is not denied, that at law a covenant in a lease gives the lessor no lien whatever upon the property of the lessee, that all the lessor can do is to bring an action for payment of the rent when it falls due, or to take his remedy for non-payment of the rent in the exact manner in which the terms of the lease enable him to do so. That is not denied, but it is said that this is a company which is not known to the common law, that it is a company which exists only under the Act of 1862, and the winding-up of a company of this kind is a creature of that Act entirely,

and that in winding-up the company the liquidators are bound to follow the directions contained in the Act; and that whatever might be the case with regard to a company which was solvent and continuing to carry on its business, there are directions in this Act which tell the liquidators what they are to do when winding-up the company, and amongst other things which they are bound to do is that which this motion seeks to order them to do, namely, to provide for a liability of this kind, to pay the future rent before they distribute the assets amongst the shareholders.

A great many cases have been cited. The case which was most relied on was *Horsey's Claim* (1), which was decided by Vice-Chancellor *Giffard*. It is important to note exactly what the decision in that case was, and what was the admission with regard to the lessor and lessee on the part of the plaintiff's counsel: because that case decided no more than this, that as between a claim for future payment and a debt due *in præsenti* in the winding-up, the debt due *in præsenti* has precedence and must be paid exactly in the same way as it would be paid if the future claim had not existed. With regard to any question between a claim of this kind and the shareholders, the Vice-Chancellor in giving judgment expressly reserved himself, and saved himself from ever being called in question as to his having given an opinion upon that subject, so that that case does not really touch the point which I have to decide here. I may say the same with regard to the case of *In re Haytor Granite Company* (2). I may say the same with regard to the case of *In re Gartness Iron Company* (3), but I will add this, that I do not find in either of those cases anything at all contrary to the argument of the lessors in this case. On the contrary, there are *indicia* in those cases that the learned Judges who decided them, if the case had been before them, would have decided in favour of the Plaintiff. In the judgment in *In re Gartness Iron Company* (4) there is a passage cited to me. The Vice-Chancellor says this: "By admitting the claim I give him all that he can claim against the company, who take by substitution of the grantees; because if the claim to £600

(1) Law Rep. 5 Eq. 561.
(2) Ibid. 1 Eq. 11.
(3) Law Rep. 10 Eq. 412.
(4) Ibid. 417.

C. A. 1886 GOOCH v. LONDON BANKING ASSOCIATION. Pearson, J.

is now admitted, neither can the dissolution of the company take place, nor anything be done by them in prejudice of that claim, without first satisfying it." In the case of *In re Haytor Granite Company* (1) the order as drawn up by the Lords Justices, which order was in contradiction of the order made by the Master of the Rolls, directed the claim to be entered for the full amount, and directed also that no step should be taken towards the dissolution of the company without notice to the person in whose favour that claim was to be entered up.

Now let me look at the Act, because, after all, it seems to me, this case must be decided according to the terms of the Act itself. The case of a partnership being wound up is absolutely different. The dissolution of a company is as different from the dissolution of an ordinary partnership as the existence of a company is different from the existence of an ordinary partnership. The liability of the partners in an ordinary partnership is unlimited, and every one of the partners is liable to the full extent of his fortune for all the debts incurred by the partnership. That is not the case with regard to a limited company. The dissolution here is intended to be a dissolution which shall terminate the existence of the company to the extent that there shall be an impossibility afterwards of anybody being able to sue the company for anything; the dissolution of a partnership leaves the partners still liable to the creditors, if there are any, for every farthing of debt that they may owe.

Now, under these circumstances, what are the provisions which the Act of Parliament has made with regard to these limited companies? The object is to discharge every liability that is due from the company, and then if there are any assets remaining to restore those assets to the shareholders to whom they belong, and to put an end to the existence of the company, so that it shall not be heard of, or known, or be found afterwards. There are only two sections which, to my mind, are really important. The first is sect. 158, which says: "In the event of any company being wound up under this Act, all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages,

(1) Law Rep. 1 Ch. 77.

shall be admissible to proof against the company, a just estimate being made, so far as is possible, of the value of all such debts or claims as may be subject to any contingency or sound only in damages, or for some other reason do not bear a certain value." That seems to me to shew how far and how widely it was intended that the liabilities of a company should be ascertained. The words of this clause sweep in, as far as I can see, every possible liability of the company, and those are to be taken account of by the person who is winding up the company. Then the 133rd section says this, "The following consequences shall ensue upon the voluntary winding-up of a company: (1) The property of the company shall be applied in satisfaction of its liabilities *pari passu*, and, subject thereto, shall, unless it be otherwise provided by the regulations of the company, be distributed amongst the members according to their rights and interests in the company." Now it is worthy of notice here, that in the first place the word used is not "debts," or "claims," or "proof," it is "liabilities," a word which would embrace everything which can possibly come within the 158th section. Those are to be disposed of in the first instance, and then the assets are to be distributed amongst the shareholders of the company. It is suggested that that is not the proper meaning of this clause, that you may proceed piecemeal, that you may distribute after paying the debts due *in præsenti*, that you may reserve nothing for other future liabilities, that you may distribute all the assets of the company, and that if any liability matures into a debt then you may make a call upon the shareholders in order that the liquidator may be in funds to discharge it.

The counsel for the bank of course do not allege, and would not allege, that after those assets had been distributed amongst the shareholders, the unfortunate creditor, if he became one, is to remain unpaid; but they say the liquidators are to make calls after they have distributed the assets. It is almost enough to say that I can find no machinery in this Act for any calls to be made by the liquidators after they have distributed the assets any more than I can find any clause in the Act authorizing the distribution of the assets before the liabilities are satisfied. But I will go even further, and say that I can conceive that there

C. A. 1886 GOOCH v. LONDON BANKING ASSOCIATION. Pearson, J.

may be cases in which any such proceeding might work the greatest injustice. You may have, as you have here, a solvent company, you may have a company in which it is not necessary to make a call to the full amount of the shares in order to pay the present debts; there may be large liabilities looming in the future: there may be assets in the liquidator's hands sufficient to provide for them all, and if you return those assets to the shareholders, and some years afterwards the liabilities mature into debts and payment has to be enforced, the result may be that many of the shareholders may by that time have become bankrupt, and the other shareholders may by that time be called upon to pay a much larger proportion of the debts than they would have been called upon to pay if the assets or sufficient funds had been kept in hand. I cannot imagine that it was ever the intention of this Act of Parliament, or of the Legislature which passed it, to provide for an intermittent winding-up of the company, or to allow a distribution of the assets one day, and a revocation of that distribution the next day. I am satisfied here that the intention of the Legislature, as shewn by all the terms of the Act, was to provide once and for all for the winding-up of the company, for the discharge of its liabilities, the distribution of its assets, if there were any to distribute, and then for the dissolution of the company; and being of that opinion I have come to the conclusion that the liquidators would be guilty of a dereliction of duty if they were to distribute the assets without providing for this liability, and that the landlord therefore in the present case, who has a claim, as it is admitted, against the company for the future rent which may become due, is interested in seeing that the liquidators discharge their duty properly, and is entitled to come to this Court and ask to restrain them, when upon the face of their affidavit it appears, and it is admitted by their counsel, that they claim as a matter of right, not with the intention of course of doing anything that is improper or dishonest, but as a matter of right, to distribute these assets without providing for this liability.

I must therefore grant the motion. I must grant an injunction restraining the liquidators in this case from distributing the assets of the company without providing for the claim of the lessor in

respect of the rent which may accrue due for these premises, No. 57, *Old Broad Street*. Of course that must be without any prejudice whatever to any question if the lease should expire in any way, or if the liability of the bank should cease by reason of the lease being assigned according to the terms and conditions of it. C. A. 1886 GOOCH v. LONDON BANKING ASSOCIATION.

In case the parties differ as to the amount to be set aside, it can be referred to chambers to settle the amount.

D. P.

The company appealed, and the appeal was argued on the 20th and 22nd of January, 1886. C. A.

*Davey*, Q.C., *Everitt*, Q.C., and *H. B. Buckley*, for the appeal:—

We say that the rights of the landlord are to prove for the damage he will sustain by having the property, which is not worth its present rental, thrown on his hands. The effect of Mr. Justice *Pearson's* order is to give him a security for which he never contracted. A landlord has no right to ask to have assets impounded to meet his claim: *King* v. *Malcott* (1). The *Companies Act*, 1862, ss. 142, 143, provides for dissolution. The scheme of the Act is to have the liabilities discharged at once, and the concern wound up. There is nothing in the Act as to impounding assets. Sect. 158 provides for the proof of all claims against the company of whatever nature they may be. An annuitant comes in and proves, and nobody ever thought of holding him entitled to have assets set apart to provide for his annuity. It is against the principle of the Act to keep the company alive simply for the purpose of paying rent under a lease.

[FRY, L.J.:—According to your argument a solvent company finding an obligation burdensome may dissolve, and get rid of the obligation by paying damages. Proof by annuitants has generally been against insolvent companies.]

The Act may require amendment to prevent its being used to defeat just claims, but it makes no distinction between solvent and insolvent companies. The cases as to landlords have arisen between them and other creditors, the question being whether

(1) 9 Hare, 692.



BIBL. LONDIN UNIV.

C. A. 1886 GOOCH v. LONDON BANKING ASSOCIATION.

they should have an immediate dividend. We contend that the course taken in those cases was erroneous, but supposing them well decided they do not govern the present. In *In re Haytor Granite Company* (1) the point was left open. *Horsey's Claim* (2) reserves the point which is now made against us, but it is only an intimation by a Vice-Chancellor that such a claim might possibly be good, and we ask the Court to disregard it. In *In re Telegraph Construction Company* (3) the case turned on the provisions of the Act as to reduction of capital. In *In re Gartness Iron Company* (4) the Court held that a claim might be entered for the future rents as had been done in *Horsey's Claim*, but not a proof, so that there could be no proof for them in competition with present creditors. It is difficult to support that on principle, but it is convenient. None of the cases except *Horsey's Claim* really touch the present. If the lessor is damnified he can present a petition for compulsory winding-up.

[FRY, L.J.:—Not after the company has been dissolved.]

Then let the liquidator be at liberty to distribute the assets without dissolving, and there will be nothing to prevent a petition to wind up compulsorily. Mr. Justice *Pearson* followed *Oppenheimer* v. *British and Foreign Exchange and Investment Bank* (5); but in that case there was no discussion as to the principle, but only as to the *quantum*, it having been taken for granted that a sum was to be set apart. There is no difficulty in investigating what is the proper sum to prove for—it would be the sum which we should have to pay to a thoroughly solvent man to induce him to take the lease off our hands. This impounding a sum sufficient to meet the rent cannot be right. The reasoning of Mr. Justice *Pearson* would apply equally in the case of a valuable lease which we had sold to a solvent assignee. Suppose a long lease for 500 years or more, such a lease as is common in *Lancashire*, a sum sufficient to pay the rent must be impounded for the rest of the term, that is practically for ever, though the land may have been built upon, so that the annual value of the property is twenty times greater than the rent.

(1) Law Rep. 1 Ch. 77.
(2) Ibid. 5 Eq. 561.
(3) Law Rep. 10 Eq. 384.
(4) Ibid. 412.
(5) 6 Ch. D. 744.

[FRY, L.J.:—It is a very strong proposition that a perfectly solvent company can by means of winding-up proceedings discharge itself from paying the rent which it has covenanted to pay.

COTTON, L.J.:—And dissolve itself so that there is no one to proceed against for the rent.]

We admit that if a claim is entered under sect. 158, there cannot be a dissolution till the claim is disposed of; but we submit that the proper construction of that section is that the claim shall be admitted to proof at a discount value like claims in bankruptcy.

*Cozens-Hardy*, Q.C., and *Stirling*, for the Plaintiff:—

*Kearns* v. *Leaf* (1) is closely analogous to the present case, and the judgment of *Jessel*, M.R., in *In re National Funds Assurance Company* (2) proceeds on the ground that the creditors of a limited company have a contract, implied if not express, that the capital shall be kept for satisfaction of their claims, and not returned to the shareholders. This covers our case. *Guinness* v. *Land Corporation of Ireland* (3) is to a similar effect, and lays down that capital cannot be repaid to shareholders even where the articles authorize it, for that nothing can be applied for any purposes not authorized by the memorandum. The company might have applied to reduce its capital, but in that case, as was decided by Vice-Chancellor *James* in *In re Telegraph Construction Company* (4), a sum must have been impounded to meet the claims of the landlord. So far, apart from winding-up. Then can the company attain their object by winding-up proceedings? The only section of the *Companies Act*, 1862, which speaks of distribution of assets among shareholders is 133, sub-sect. 1, which provides for distribution only after satisfying liabilities.

[BOWEN, L.J.:—On your view could not a creditor by not coming in prevent the distribution?]

Probably under sect. 138 the liquidator could compel him to come in. Where the company is insolvent no question arises.

(1) 1 H. & M. 681.
(2) 10 Ch. D. 118.
(3) 22 Ch. D. 349.
(4) Law Rep. 10 Eq. 384.

C. A. 1886 GOOCH v. LONDON BANKING ASSOCIATION.

[FRY, L.J.:—Suppose the creditor stood out and insisted on his strict rights, what order could the Court make against him? Suppose the company offered him the whole rent in full, and the estimated value of the covenant to repair, how could he be compelled to accept the offer? It would be altering the contract.]

We submit it would be within the powers of the Court under sect. 138. But in the present case let the company pay us the value of the rent treated as an annuity, and the estimated value of the covenants, and the lessor is willing to let them hold the property rent free for the remainder of the term.

*Davey*, in reply:—

The argument of the Respondents goes to a great length—that not a penny can be repaid to shareholders while a lease in which the company are original lessees is subsisting. A company which takes a long lease may thus be kept on foot for centuries.

[COTTON, L.J.:—How do you oblige a person to accept a lump sum in lieu of an annual payment in a voluntary winding-up? When a company is wound up by the Court a day is fixed for claims to be sent in.]

Under sect. 138 the Court has the same powers as in a compulsory winding-up.

[A proposal was here made that there should be a reference to Chambers to ascertain what would be a fair sum to be allowed to the lessor for accepting a surrender of the lease. The Court expressed an inclination of opinion that this would make the Chief Clerk an arbitrator, and Mr. *Cozens-Hardy* declined the offer. The reply then proceeded.]

[COTTON, L.J.:—My great difficulty is this, can we construe the Act as authorizing a solvent company to get rid of its contracts?]

The Act draws no distinction between solvent and insolvent companies. A company may fairly wind up for its own purposes, as, for instance, because the business is unprofitable, though it may be perfectly solvent. The scheme of the Act is that the liabilities of the company should be satisfied at once, and the

company be wound up. Sect. 133, sub-sect. 1, provides that the debts and liabilities are to be satisfied, which must mean that future and contingent debts and liabilities are to be proved for as in bankruptcy. The Plaintiff wants to change the words of the Act. Setting apart a fund to meet a liability is not satisfying it.

C. A. 1886 GOOCH v. LONDON BANKING ASSOCIATION.

---

At the close of the arguments the Court reserved judgment, which was never delivered, the parties having come to an arrangement that it should be referred to two persons named by them to determine what sum ought to be paid to the Plaintiff for accepting a surrender of the lease.

Solicitors: *Bircham & Co.; Murray, Hutchins, & Stirling.*

H. C. J.

---

## NOYES *v.* POLLOCK.

C. A. 1884 PEARSON, J. *July* 9, 10, 14. C. A. 1886 *Feb.* 1, 2, 3.

[1882 N. 1497.]

*Mortgagee in Possession—Receipt of Rents and Profits—Mortgage of two Estates—Sale of Part of one in Reduction of Debt—Claim of the Mortgagor of the other Estate.*

The fact that mortgagees are in receipt of the rents and profits of the mortgaged estate does not necessarily make them chargeable as mortgagees in possession. The question whether they are mortgagees in possession depends upon whether they have taken out of the mortgagor's hands the power and duty of managing the estate and dealing with the tenants.

*B.* was the agent of a mortgagor, and received the rents of the estate for him, and applied them in payment of the interest to the mortgagees. The mortgagees wrote to *B.* inclosing notices to the tenants to pay the rents to them, which he was to serve on them if the mortgagor should attempt to interfere. *B.* replied promising to pay the rents to the mortgagees and not to the mortgagor. The notices were not served on the tenants, but *B.* paid the rents as he received them to the mortgagees:—

*Held* (reversing the decision of *Pearson*, J.), that the mortgagees could not be charged as mortgagees in possession.

A married woman having a charge on settled estates for her jointure joined with her husband in mortgaging them and another estate of which he was absolute owner. Afterwards the husband sold the unsettled estate, the mortgagees joining, and the purchase-money was paid partly in reduc-

C. A.
1886
NOYES
v.
POLLOCK.

tion of the mortgage debt and partly to the husband. The wife did not join in the conveyance, but consented to the transaction:—

*Held* (affirming the decision of *Pearson*, J.), that whatever equity the wife might have against her husband or the estate which had been sold, she had no equity to charge the mortgagees with the sum paid to her husband.

BY the settlement made on the marriage of Mr. *Thomas Herbert Noyes* and *Mary* his wife, the Plaintiff in the present action, and dated the 9th of November, 1826, certain freehold estates of considerable value in *Oxfordshire*, *Warwickshire*, and *Sussex*, were conveyed to trustees to the use of *T. H. Noyes* for life, with remainder to trustees for 500 years for securing a jointure rentcharge of £700 a year to the Plaintiff, and for raising portions for younger children, and subject thereto to the use of the first and other sons of the marriage in tail. *T. H. Noyes* the younger, the eldest son of the marriage, came of age in 1848, and the estates were then disentailed and limited, subject to the life estate of the father and the term of 500 years, to such uses as the father and his eldest son should jointly appoint, and in default to the uses of the settlement. Mr. *Noyes* was also absolutely entitled to a house in *Dover Street, Piccadilly*, which was not included in his settlement.

By an indenture of mortgage dated the 31st of October, 1861, Mr. *Noyes* and his eldest son mortgaged the freehold estates comprised in the marriage settlement and also the house in *Dover Street* to the Defendants, who were the trustees for the *London Life Association*, in fee for £70,000. The Plaintiff was made a party to and acknowledged this indenture under the provisions of the *Fines and Recoveries Act* for the purpose of postponing her jointure out of the settled estates and her dower out of any hereditaments which might be subject thereto to the charge of the Defendants. The indenture contained the usual power of sale to the mortgagees.

In the year 1865 the house in *Dover Street* was sold by Mr. *Noyes* for £13,000, and the Defendants, the mortgagees, agreed to concur in the sale on condition of receiving £10,000 paid to them in reduction of their mortgage debt. The remaining £3000 was received by Mr. *Noyes*.

The Plaintiff did not join in the conveyance of the house in *Dover Street* to the purchaser, but it appeared from the evidence that she was made acquainted with the transaction and consented to it. She stated, however, that at the time she did not know, or forgot, that the house was comprised in the mortgage to the Defendants, and was not aware of her legal position with respect to it.

The rents of the *Sussex* estates were collected by a Mr. *Drawbridge*, and he paid them to Mr. *J. H. Blood*, a solicitor at *Witham*, who was Mr. *Noyes'* agent. Mr. *Blood* paid the interest to the mortgagees out of the rents.

On the 23rd of September, 1869, Messrs. *Druce & Jackson*, the solicitors of the Defendants, wrote to Mr. *Blood* as follows:—

"We send you notices to the *Sussex* tenants and to yourself as receiver, requiring payment to our clients of the Michaelmas and future rents. Should Mr. *Noyes* attempt to interfere please serve the tenants, and we hereby authorize you to receive the rents under our said notices on behalf of our clients, but not of course for Mr. *Noyes*."

To this letter Mr. *Blood* replied on the 24th of September as follows:—

"I have received your notices, and you may rest assured that no rents shall go to Mr. *Noyes* so far as the *Sussex* estates are concerned."

The notices were, however, never served on the tenants; but Mr. *Blood* continued to receive the rents and to pay them to the Defendants. He gave them no detailed accounts of the amounts received from the tenants, but paid them sums of £400 or £500 at a time, although Messrs. *Druce & Co.* wrote to him from time to time asking for the particulars of the rents.

In 1878 an action of *Noyes* v. *Mitchell* was commenced by Mr. *Noyes* for the redemption of the mortgaged estates, in which it was ordered that a sum of £15,000 consols then in the hands of the Defendants, representing the proceeds of part of the *Warwickshire* estate which had been sold should be paid into Court to the credit of the cause to an account entitled "The £12,000 Portion Account," and that Mr. *Noyes* should be let into the receipt of

C. A. 1886 NOYES v. POLLOCK.

the rents of the *Sussex* estates. On that occasion Mr. and Mrs. *Noyes*, who were living separate, signed an agreement, dated the 12th of December, 1878, by which it was recited, among other things, that Mrs. *Noyes* was advised that she was entitled to have part of the purchase-money which Mr. *Noyes* had received from the proceeds of part of the unsettled estates recouped out of the rents and dividends thereafter to be received during the life of the said *T. H. Noyes* from the *Sussex* estates and Bank annuities, and retained as a further security for the payment of her jointure; and it was agreed that she should waive any such claim in consideration of *T. H. Noyes* paying her £150 a year for the benefit of their eldest son and daughters.

Mr. *Noyes* died in December, 1881.

On the 3rd of August, 1882, an order was made in the action of *Noyes* v. *Mitchell*, on a petition in which Mrs. *Noyes* joined, that £3050, part of the £15,000 consols in Court, should be paid out to two of their younger children.

The Defendants had received a considerable part of their mortgage debt from the proceeds of portions of the estates which had been sold and from other sources, and the present action was brought by Mrs. *Noyes* for an account of what was still due to them, and for the redemption of the estates; and she claimed that the accounts should be taken against them as mortgagees in possession.

The action came on for hearing before Mr. Justice *Pearson* on the 9th of July, 1884.

*Napier Higgins*, Q.C., and *Latham*, for the Plaintiff.

*Rigby*, Q.C., and *Stirling*, for the Defendants.

*Cookson*, Q.C., and *Rawlinson*, for *T. H. Noyes* the younger, the first tenant in tail.

*Warmington*, Q.C., and *Lipscomb*, for the trustees of the term of 500 years.

1884. July 14. PEARSON, J. (after stating the facts, continued):—

The first question is whether or not, after the execution of the agreement of the 12th of December, 1878, Mrs. *Noyes* can

now be heard to object to the payment of the £3000 to Mr. *Noyes*. I am of opinion that she cannot. Whatever rights she may have had, if she had any, in the year 1865, when the *Dover Street* house was conveyed to Colonel *Edwards*—although at that time she certainly had notice that the house was being sold, and although it appears to me tolerably plain that she knew that her husband received the £3000 then—I think she entirely ratified and affirmed the payment of the £3000 to her husband in 1878. She was, it is true, no party to the suit of *Noyes* v. *Mitchell* in 1878, but I think she would have had a right, considering all the circumstances of the case, either to be made a party formally, or at all events to have obtained liberty to attend the taking of the accounts between the *London Life Association* and her husband, and if at that time, when the accounts between her husband and the society were being taken, she had objected to the payment of this £3000, the result must have been, that if her objection had been successful, the *London Life Association* would have been entitled to that to which she was entitled, and could have impounded all Mr. *Noyes'* life interest in order to make good to them the £3000. But after the agreement of 1878 I am of opinion that this Court would not have allowed Mrs. *Noyes* to take the benefit of an objection which indirectly would have subjected her husband exactly to that liability from which she had released him.

Considering what very slight circumstances will enable the parties who have taken a security from a surety to say that the surety has assented to that which they have done, considering the case cited by Mr. *Rigby* of *Woodcock* v. *Oxford and Worcester Railway Company* (1), before Vice-Chancellor *Kindersley*, I think that the agreement of 1878 cannot be considered otherwise than as a ratification on the part of Mrs. *Noyes* of that which had been done, and done, as I believe, with her knowledge in 1865.

I come, therefore, to the conclusion that the contention that she has raised that the £3000 should not be allowed to the *London Life Association* must be overruled.

The only other question was this: There were amongst the settled estates, estates in *Warwickshire*, estates in *Oxfordshire*,

(1) 1 Drew. 521.

C. A. 1886 NOYES v. POLLOCK. Pearson, J.

and estates in *Sussex*. It was admitted in the course of the argument on behalf of the Society that they could not contend that they were not in possession of and must not be treated as mortgagees in possession of the estates in *Oxfordshire* and *Warwickshire*; but with regard to the *Sussex* estates Mr. *Rigby* disputed that they were admitted into possession at all, and his contention was as follows: Mr. *Noyes* being the tenant for life employed his agent Mr. *Blood*, a solicitor living at *Witham*. Mr. *Blood*, it appears, had a security of his own upon the property, and in September, 1869, he was receiving all the rents for Mr. *Noyes*. On the 23rd of September, 1869, Messrs. *Druce & Co.*, the solicitors for the Society write to Mr. *Blood* and he replies to them on the following day. [His Lordship read the letters set forth above.] I have come to the conclusion that there could not be a clearer taking of possession of the mortgaged property than these letters shew, the letters having been acted upon, Mr. *Blood* being treated afterwards as receiving the rents on account of the Society, and being called on from time to time by the Society to account for the rents so received. It is said that Mr. *Blood* never served the notices on the tenants. He was to serve the notices if necessary. What he intended to do I have no doubt was this: being not only the solicitor for the family, but very friendly towards them, he desired as far as possible that the world in general should not know of the disordered state of Mr. *Noyes'* finances, and accordingly, being able to receive the rents under the authority he formerly had from Mr. *Noyes* without using the notices given by the Society, he did so, and in the face of the world appeared to be receiving them for Mr. *Noyes*. But it is impossible to doubt that the direction here was to receive them from the Society, and if there was any difficulty whatever in receiving them under the authority under which he was acting, he was to use the notices which had been sent by the Society, if necessary to restrain any interference by Mr. *Noyes*, and to compel the tenants of the estate to pay their rents to him as receiver for the *London Life Association*. I think, therefore, that under these circumstances Mr. *Blood* did actually receive the rents afterwards for the Society and not for Mr. *Noyes*, and in fact unless he did so there was hardly any justification for the letters

that were written, or for his acts in collecting and paying the rents as he did from time to time to the Society. I must hold, therefore, that with regard to this the Plaintiff's contention was right, and that the Society in any account that is taken must be considered as having been mortgagees in possession of all the settled estates from Michaelmas, 1869 to the 3rd of August, 1878.

The matter was afterwards brought before Mr. Justice *Pearson* and the Court of Appeal on the question of the form of the account to which the Plaintiff was entitled under the judgment (1).

The Defendants appealed against the judgment of the 14th of July, 1884, so far as it ordered them to be treated as mortgagees in possession of the *Sussex* estates. The Plaintiff gave cross-notice of appeal against the direction that the Defendants should be allowed the sum of £3000, part of the proceeds of the *Dover Street* house.

The Defendants' appeal was first argued.

The Appellants had given notice of an application to the Court of Appeal for leave to adduce fresh evidence by calling Mr. *Drawbridge* as a witness to shew his accounts with Mr. *Blood*.

The Court refused the application on the ground that the Defendants might have called Mr. *Drawbridge* at the trial.

The appeals came on for hearing on the 1st of February, 1886.

*Cozens-Hardy*, Q.C., and *Stirling*, for the Appellants:—

We contend that we never entered into possession or receipt of the rents and profits of the *Sussex* estates. Taking possession is not a question of intention but of fact. We sent notices to *Blood* which we authorized him to serve on the tenants in case Mr. *Noyes* interfered with them and attempted to receive the rents himself, but it never became necessary to serve them and they were not served. In order for a mortgagee to be a mortgagee in possession, he must put himself in the position of landlord to the tenants: we have never had any communication with the tenants; all we have done was to call upon the person who, as solicitor of

(1) 30 Ch. D. 336.

C. A. 1886 NOYES v. POLLOCK.

the mortgagor, superintended the management of the estate and received the rents from the local agent to pay what he received to us. The tenants having had no notice to pay their rents to us would have been bound to pay them to *Noyes* if he had applied for them; how, then, can we be mortgagees in possession? *Ward* v. *Carttar* (1) shews that there must be something in the nature of an attornment.

*Napier Higgins*, Q.C., and *Latham*, for the Plaintiff:—

If the mortgagee intercepts the rents before they come to the hands of the mortgagor, he is mortgagee in possession. It is not necessary for him to put himself in such a position as to have power to distrain: *Heales* v. *M'Murray* (2); any intercepting the rents is enough. *Drawbridge* was bound to act on the instructions of *Blood*, who was made the agent of the mortgagees by the correspondence between them. Surely taking the rents and interfering with the mortgagor's receipt of them is putting the mortgagor out of possession.

During the argument for the Respondent the Court offered the Respondent leave to produce further evidence to shew the position in which *Drawbridge* stood towards *Blood* and the mortgagor; but the offer was declined.

*Cookson*, Q.C., and *Rawlinson*, for the tenant in tail.

*Warmington*, Q.C., and *Lipscomb*, for the trustees of the term.

COTTON, L.J.:—

The appeal which we are now dealing with is an appeal against that part of the judgment of Mr. Justice *Pearson* which declared that the Defendants, the trustees of the *London Life Association*, were to be treated as mortgagees in possession, and there was a consequential direction dependent upon that that the accounts should be taken against them not only for what they received but for what, but for their wilful default, they ought to have received. It is not said here that they were in actual possession of these

(1) 35 Beav. 171. (2) 23 Beav. 401.

*Sussex* estates, but what is contended for is that they were to be treated as mortgagees in possession, because they were in receipt of the rents and profits of the estate.

There is no difficulty in ascertaining whether there has been actual taking possession of an estate by the mortgagees; but there has been a great deal of argument here as to whether what took place in the present case did not amount to an entering into a receipt of the rents and profits by the mortgagees. I think a consideration of what is the consequence of holding that the mortgagee is in receipt of the rents and profits, will throw light upon what is meant by such receipt. If the mortgagee is in receipt of the rents and profits the account is taken against him as if he were in possession, and he is answerable not only for what the tenants pay, but for not letting the property if he could have done so, and for not getting the full rents from the tenants if they could have paid them; and he is looked upon as if he had taken upon himself the control and management of the estate as between those in actual occupation and the mortgagor, so as to put an end to any right which the mortgagor has of dealing with the estate in the way of management, including letting and making allowances to tenants, and getting the best rent from them he can.

In order to hold that a mortgagee not in actual possession is in receipt of the rents and profits, in my opinion it ought to be shewn not only that he gets the amount of the rents paid by the tenants, even although he gets their cheques or their cash, but that he receives it in such a way that it can be properly said that he has taken upon himself to intercept the power of the mortgagor to manage his estate, and has himself so managed and received the rents as part of the management of the estate.

To my mind, a great deal of the argument here turns upon the equivocal use of the words "receipt of rents," because it was said that as the mortgagees here have got, or tried to get, the whole amount that was paid for rents, they are in receipt of the rents. They are in receipt of the sum of money the amount of which was determined by the rents received; but they were not in receipt of the rents, as intercepting between the tenants and the mortgagor or his agents the rents which were payable for

C. A. 1886 NOYES v. POLLOCK. Cotton, L.J.

the land by the tenants, or as part of the management of the estate undertaken by them.

Before I deal with the letters, I may say that there has been a great deal of difficulty in this case from the deficiency of the evidence offered on the part of the Plaintiff. The Plaintiff alleged that the trustees were mortgagees in possession. The Defendants denied it, and said that all that they had done was to receive the amount collected for rent from the agents for the time being of the mortgagor. And the Plaintiff has not met that satisfactorily, for we really have no evidence at all as regards the position of Mr. *Blood*. He was not receiving the rents from the tenants, but from another person—Mr. *Drawbridge*, who received them from the tenants. We offered Mr. *Higgins* an opportunity of adducing evidence as to the position in which Mr. *Blood* and Mr. *Drawbridge* stood towards each other and towards Mr. *Noyes*, but he declined to avail himself of it. He was at perfect liberty to decline that offer. But we have to decide the case on only such glimpses of the facts of the case as we have before us, to enable us to determine what was the real meaning of the letters.

Undoubtedly, as I have said, if a mortgagee only intercepts rents after they have been received by the agents of the mortgagor, then those rents having gone to the mortgagor have not been intercepted by the mortgagee in such a way as to shew that he deprives the mortgagor of the control and management of the property; but it is said here that Mr. *Blood* was appointed agent by the mortgagees, which put an end to his agency for the mortgagor, Mr. *Noyes*, and that this was such a taking possession as to make them responsible to the mortgagor, and put them into the position of mortgagees in possession.

Now let us look at the letters. The earliest one I need refer to is that letter of the 23rd of September, 1869. [His Lordship read the letter.] I understand that as meaning "If Mr. *Noyes* tries to interfere, then you are to serve the tenants, and then you will become receiver for us from the tenants, but until these notices are served they are not to become effectual in any way." What was Mr. *Blood's* position at that time? We have no evidence, but as far as we can see, his position was this, that by some arrangement between him and Mr. *Noyes*, *Drawbridge*, who

was actually receiving the rents, handed those rents over to Mr. *Blood* as agent for and on behalf of Mr. *Noyes*. Then the result of this letter, as acted upon, was that the notices were not served, but that Mr. *Blood*, in order to prevent the mortgagees from taking possession, by giving notices to the tenants and so injuring the credit of Mr. *Noyes*, said "I received these rents for Mr. *Noyes*, and will take care that nothing is handed over to Mr. *Noyes*; I will pay what I have got on behalf of Mr. *Noyes* to you in order to prevent you from performing that threat which is contained in your letter." If that is so, in my opinion, although it is a receipt of the amount paid to Mr. *Blood* for rents and profits, it is not a receipt of the rents and profits in the sense of interfering with and undertaking the management of the property. It is not such a receipt as would justify the Court in making the decree against the mortgagees as mortgagees in possession, or as mortgagees who, if not in possession, had received the rents and profits in such a way as to make themselves answerable for the management of the estate, including any loss which might have been incurred by their not enforcing their rights against the tenants, or by not letting land to tenants, or leaving it unlet when they might have let it. In my opinion this portion of the judgment is erroneous, and must be reversed.

BOWEN, L.J.:—

I am of the same opinion. The Defendants did take the rents and profits in some sense, but we have to consider what that sense is upon the evidence (which is somewhat imperfect) before us; remembering always that it is for the Plaintiff to make out his case. Was it in the sense in which the words "receipt of rents and profits" are used, when it is said that the person who receives the rents and profits of the estate which is let to tenants becomes a mortgagee in possession?

In order to answer this question we must look at the reason and the principle of the thing, and I find it in the words of Lord Justice *Turner*, who has explained it very clearly in *Lord Kensington* v. *Bouverie* (1): "A mortgagee, when he enters into posses-

(1) 7 D. M. & G. 134, 157.

C. A. 1886 NOYES v. POLLOCK. Bowen, L.J.

sion of the mortgaged estate, enters for the purpose of recovering both his principal and interest, and, the estate being, in the eye of this Court, a security only for the money, the Court requires him to be diligent in realizing the amount which is due, in order that he may restore the estate to the mortgagor, who, in the view of this Court, is entitled to it. It is a part of his contract that he should do so." When the estate is in hand, so to speak, and the mortgagor has been left in occupation of the estate by the mortgagee, the mortgagor is either tenant at will or tenant by sufferance to the mortgagee, and any act which puts an end constructively or by express agreement between the parties, to the tenancy at will or by sufferance, whichever it is, determines the occupation of the mortgagor and leaves the occupation in the hands of the mortgagee. But in the case where an estate is let to tenants, of course the mortgagee does not enter upon actual occupation of the demised premises. He may fall under the principle as a person who enters and takes possession of the rents and profits; but only, as it seems to me, if he does something which goes beyond the mere receipt of sums of money to which the rents and profits may amount, and reaches a point at which he displaces, for the purpose of realizing the security, the mortgagor from the control and dominion of the reversion of the estate which is demised. Unless the dominion and control is taken in that sense, the mere receipt of the produce of the management may be taken by the mortgagee, and yet he may stop short of taking the management itself. He may take the rents; that is not enough unless he takes the rent in such a way as to take upon himself, and out of the hands of the mortgagor, the business and the duty of collecting and being diligent in that respect.

We have to see in the present instance, upon materials which are very incomplete, whether there is any proof that the mortgagees had not merely taken the rents, but taken upon themselves and out of the hands of the mortgagor the business and duty of collecting. [His Lordship then commented on the letter of the 23rd of September, 1869, and continued:—] I do not at all wish to intimate any opinion that an actual notice to the tenants would be necessary in every case to displace the

mortgagor from the control and dominion of the estate. It may be that if the mortgagor stands by, as has been said in the course of the argument, in fear of legal process and allows the control and dominion of the estate to be in fact taken out of his hands, the mortgagee does enter into the receipt of the rents and profits in such a sense as to render him liable for default in the management and collection of the rent. But in this particular case we are left in absolute ignorance of what is done except so far as is indicated in these letters, and I confess that I think the silence of the parties, the absence of all proof on Mr. *Higgins'* part, and his declining, no doubt on the instructions of his client, to go further into evidence in the matter justifies me in coming to the conclusion that although the produce of the management was intercepted in the hands of the mortgagor, it was never intended to displace the mortgagor from the management of the estate, and that in fact he was not displaced in spite of the letter of 1869. For that reason I think the Defendants, the Appellants, are entitled to succeed on this part of the appeal.

FRY, L.J.:—

The judgment pronounced in this case by the Judge of the Court below declared that the *London Life Association* are to be treated as having been mortgagees in possession of the *Sussex* estates down to the 3rd day of August, 1878. The question is whether that declaration is justified. That they were in possession strictly speaking is not contended. What is argued is that they were in such possession of the rents and profits that they ought to be deemed to have been in possession of the estate. That turns on the letters.

The first inquiry to which my mind addresses itself is this—what was the position of things on the 23rd of September, 1869, when the most material letter was written? And it appears to me that the Plaintiff has furnished most scanty materials for answering that most important inquiry. But, judging in the best manner I can on the evidence before me, the conclusion to which I arrive is this,—that at that date Mr. *Noyes* had constituted Mr. *Drawbridge* his actual agent to manage the estates, or at all

C. A. 1886 NOYES v. POLLOCK. Fry, L.J.

events to receive the rents from the tenants, and that he had given some direction to Mr. *Drawbridge* to pay over the net proceeds, after allowing for repairs and necessary outgoings, to Mr. *Blood*, who was the solicitor to Mr. *Noyes*, and in the usual course of things Mr. *Blood* would apply the money received by him from Mr. *Drawbridge* either in the payment of debts or in the manner directed by Mr. *Noyes*.

That was the state of things when on the 23rd of September, 1869, the solicitors of the association addressed to Mr. *Blood* the letter which has been referred to.

[His Lordship read the letters and the subsequent letter of the 25th of September.]

I conceive that the result of all this is, that Mr. *Blood* in effect says to the mortgagees, "Even before the notices are served I will not allow Mr. *Noyes* to receive any money from the *Sussex* estates; I shall pay them over to you. I, as Mr. *Noyes*' agent, undertake to pay those rents to you, and furthermore, if I become your receiver under the authority which is conditional upon the service of these notices, I shall receive the moneys from Mr. *Drawbridge*, and pay them over to you." That I conceive is the effect of those letters: then in fact it is shewn that those notices were never served on the tenants. Therefore, in my opinion Mr. *Blood* continued to pay, as he did pay, the *London Life Association* not by force of any notice contained in the letter of the 23rd of September, but because he chose as the agent of Mr. *Noyes* to do the best he could.

Then if I look at the subsequent correspondence I think that I am bound to infer, in the absence of evidence, that the *London Life Association* never interfered with the management at all, and that the rents continued to be received by Mr. *Drawbridge* as they had been received before, as the agent of the mortgagor, and then Mr. *Blood* when those rents came to his hands paid them to the mortgagees.

I think, therefore, that the declaration of the learned Judge giving the direction that the *London Life Association* were liable for the rent which might have been received is not right.

Perhaps I ought before parting with the case to make an observation on one of the authorities pressed upon us, *Heales* v.

*M'Murray* (1). In that case the mortgagee had given notice to the tenants not to pay the rent to the mortgagor, and under those special circumstances he was held liable for what he might have received. In the present case no notice was given to the tenants at all. Here nothing exists analogous to the circumstances there—the mortgagee neither letting the mortgagor receive, nor receiving himself.

The result will be, that so much of the order and declaration as relates to the *Sussex* estates will be struck out. The account of the rents and profits of the *Oxfordshire* and *Warwickshire* estates will remain.

The cross notice of appeal was then argued.

*Napier Higgins*, Q.C., and *Latham*, for the Plaintiff:—

The Plaintiff had an equitable interest in the unsettled estate, of which she could not be deprived, being a married woman, except by a deed duly acknowledged under the statute. Her knowledge and acquiescence would not be sufficient to bar her right: *Cahill* v. *Cahill* (2).

*Cozens-Hardy*, Q.C., and *Stirling*, for the Defendants:—

The Plaintiff and her advisers were quite aware of her rights at the date of the agreement with her husband. She was then living apart from her husband, and was separately advised. We also rely upon the order of the 3rd of August, 1882, when she consented to the payment out of Court of the fund which was liable to make good her claim. It is not necessary for us to prove that there was a bargain. It is sufficient to shew acquiescence. The Plaintiff's only right was as a surety to prevent anything being done to her prejudice, but this may be released by acquiescence: *Mayhew* v. *Crickett* (3). This applies to a married woman, who is asserting a personal equity.

[FRY, L.J.:—Is there any authority for acquiescence binding a married woman?]

Every person seeking equity must do equity, and a married

(1) 23 Beav. 401. (2) 8 App. Cas. 420.
(3) 2 Sw. 185.

C. A. 1886 NOYES v. POLLOCK.

woman is not exempt from that rule. The Plaintiff was not merely passive in the matter; she encouraged the payment of the money to her husband in order that her son's debts might be paid: *Clive* v. *Carew* (1); *Sawyer* v. *Sawyer* (2); *Smith* v. *Winter* (3); *Stafford* v. *Stafford* (4).

Moreover, if the Plaintiff has any right, it is a right against the house, and she must enforce it against the house in the hands of the purchaser. She has no personal claim against the mortgagees, which is all that is in question in this action.

*Latham*, in reply.

COTTON, L.J.:—

This was an appeal by the Plaintiff against so much of the judgment of Mr. Justice *Pearson* as declared that the mortgagees were in effect to be allowed a sum of £3000 which arose from the sale of certain property comprised in the mortgage.

There were two sets of estates. There were unsettled estates, which belonged absolutely to Mr. *Noyes*, and there were settled estates on which the present Plaintiff had a jointure, and she joined in a mortgage on the settled estates in order to postpone her jointure.

It seems to me that Mr. Justice *Pearson's* judgment was not quite correctly worded: it ought not to be that they are to be allowed these two sums, but that, according to the decision, they are not to be charged with those sums. What was the equity insisted upon here by the Appellant, the Plaintiff? In seeking to charge the mortgagees with those sums she was really seeking to enforce against them something in the nature of a personal equity. The Plaintiff contends that she had an interest in the unsettled estates so as to recoup anything which was thrown on the settled estates to her prejudice. But that must be a claim as against the equity of redemption of that land, not as against the mortgagees, so as to prejudice them in any way; but only if the mortgage money was paid out of the settled estates, then she would have a right as against the unsettled estates to be

(1) 1 J. & H. 199.
(2) 28 Ch. D. 595.
(3) 4 M. & W. 454.
(4) 1 De G. & J. 193.

recouped whatever had been done to her prejudice by the burden having been thrown on the settled estates, the mortgage being entirely for the benefit of her husband. It would be just the same as if there had been estates belonging absolutely to *A.* and *B.*—the whole of the money paid to *A.*, but the mortgagees raising the money, as they would be entitled to do, entirely out of the estate of *B.* Then *B.* in that view, and I do not say that it is incorrect, would have a claim against the equity of redemption of *A.* in order to be recouped.

Now, undoubtedly the Appellant was correct in saying that such a right could only be dealt with by the married woman by a deed duly executed under 3 & 4 Will. 4, c. 74, because such an equity as she is insisting upon would come within the meaning of the word "estate" in the Act, which extends to an estate in equity as well as at law. But what is the result? The sale was not by the mortgagees under their power of sale. If it had been they would have been answerable for the due application of the money under the provisions of the mortgage deed. But the evidence shews that the sale was by Mr. *Noyes* and not by the mortgagees, and the mortgagees simply joined in order to prevent any claim by them as against the purchaser, being satisfied that the £3000 should be received by Mr. *Noyes*. What is the consequence? If there is such a right as contended for by the Appellant, she did not in any way, by a deed executed under the statute, join in the conveyance of the land so as to get rid of her right of claiming as against the land. But the mortgagees did not receive the money; they did not sell, and the view taken by her counsel as to her rights (against which I give no opinion at all—the parties to meet that not being here), is that her equity not being barred by her, still subsists as against the equity of redemption, that is to say, as against such interest as Mr. *Noyes* had, and as he purported to deal with by the mortgage.

Therefore, in substance, the judgment of Mr. Justice *Pearson* (although we decide on different grounds) is right.

BOWEN, L.J.:—

I am of the same opinion. What was the right of Mrs. *Noyes?* It was not a personal equity against Mr. *Noyes*. It was that she

C. A. 1886 NOYES v. POLLOCK. Bowen, L.J.

had an interest in land, an equity of redemption in the unsettled estates. That is the right which, if it still exists—if she has done nothing to lose it—as to which on the present occasion it is not necessary to say anything, because the purchaser is not before us—but if this right still exists, it would exist still against the purchaser with notice of the equity of redemption. The mortgagees have not sold under the power of sale. The sale was a sale by the mortgagor with the concurrence of the mortgagees, and the mortgagees are not liable simply because the purchaser has paid a portion of the money to the mortgagor, and because they have not received the whole of it. How can they be charged with wilful default because they have not received the whole of the money? They got as much as they could get. It seems to me the Plaintiff's rights are rights against the mortgagor and against the purchaser with notice of the equity of redemption, and that she has nothing to do with the mortgagees.

FRY, L.J. (after shortly referring to the facts, continued):—

It appears to me that the case must be treated as if it was a mortgage by two mortgagors of separate estates—as if *A.* was mortgaging *Whiteacre*, and *B.* was mortgaging *Blackacre* to the same mortgagees, and as if the whole money was received by *A.*

Now, if there be any right in *B.* (and I am far from saying there is no right), it appears to me that whatever right he has is a right of going against the equity of redemption of *A.'s* estate, *Whiteacre*, in the event of any portion of the mortgage-money being raised out of his *B.'s* estate, *Blackacre*. But it appears to me further that *B.* has no right whatever to interfere with or to fetter in any manner the rights of the mortgagees, and that it would be open to them to deal with the mortgaged estates in any manner which they might think reasonable and proper. I think, therefore, whatever that right was, it was a right of *B.* against the equity of redemption of the other estate.

That being so what happened was this. In 1865 the mortgagees of the settled and unsettled estates concurred in a sale by the owner of the equity of redemption of a portion of the unsettled estates namely, the *Dover Street* property. In so acting they were acting quite within their rights.

I think, for the reasons I have already mentioned, that they were perfectly free from any equity existing between the two mortgagors, but in the present case I may add that it appears to me that they acted very reasonably in what they did. I am far from sure that they would ever have received the £10,000 if they had not allowed the mortgagor to sell, which he would not have done unless he received £3000. But that appears to me to be an immaterial consideration in the present case. The view which I take of it is, that whatever rights the jointress may have, by reason of her interest in the unsettled estates, those rights are rights against the equity of redemption of the settled estates. Whether she has any right against the purchaser of the property is a point on which I say nothing. All I say is, that if there is any right of that description, that right has not been interfered with or prejudiced; but even if it had been, it is a right which does not affect the mortgagees. Therefore I am at a loss to see how they can in any manner be affected by the transaction in which they were perfectly within their rights as mortgagees and in which they were not interfering in any manner with the equities secured subject to and posterior to their rights. Therefore with regard to the sale of the *Dover Street* house, it was their property, and it is impossible to affect them with any liability. The argument which prevails with me is that which Mr. *Stirling* suggested in the course of his address, namely, that if such a right exists the right is not against the mortgagees, but against the mortgagor and those interested under him.

For these reasons, with the variations suggested by *Cotton*, L.J., I concur in the judgment. This will not affect the costs.

Solicitors: *Walters, Deverell, & Co.*; *Druces & Attlee.*

M. W.

C. A.
1885
KAY, J.
*Dec.* 17.
C. A.
1886
*Feb.* 17.

## LYNCH *v.* COMMISSIONERS OF SEWERS OF THE CITY OF LONDON.

[1885 L. 3026.]

*Commissioners of Sewers—Power to take Land*—57 *Geo.* 3, *c. xxix.*—*City of London Sewers Act*, 1848 (11 *& 12 Vict. c. clxiii.*), *s.* 120—*Acquiescence—Adjudication by Commissioners.*

The Plaintiff was owner of six adjacent houses, five in *G. Place*, and one in *Butler's Alley*. Four of the houses in *G. Place* adjoined *Butler's Alley*. On the 2nd of December, 1884, the Commissioners of Sewers resolved to alter, widen, and extend *Butler's Alley*, and adjudicated that the Plaintiff's six houses were required for that purpose. Shortly afterwards they served the Plaintiff with a notice to treat, which stated that the houses were required for altering and widening *Butler's Alley*. The Plaintiff sent in a claim for £2500. The parties could not agree about the price, and in October, 1885, the negotiations having come to an end, the Commissioners proceeded to summon a jury. The Plaintiff then made inquiry as to their plans, and commenced this action to prevent them from taking the property. It appeared from a plan sent to the Plaintiff in November, 1885, which was the first information he had as to the nature of the alterations proposed by the Commissioners, that the part of *Butler's Alley* which lay at the back of the four houses in *G. Place* was only to be widened by a strip tapering from the width of twelve inches to a point, and it appeared that considerable alterations were to be made in the level of *G. Place* and *Butler's Alley*. The Plaintiff moved for an injunction:—

*Held*, by *Kay*, J., that the Plaintiff not having objected to the notice to treat, but having negotiated for the sale, was estopped from disputing the right of the Commissioners to take the property as in *Thomas* v. *Daw* (1).

*Held*, on appeal, that *Thomas* v. *Daw* was inapplicable, as in that case the plaintiff knew all along what the plans of the Commissioners were, whereas in the present case the Plaintiff did not know them till after the negotiations were at an end, and was justified in believing the representation in the notice that his houses were required for altering and widening *Butler's Alley*, and that the Plaintiff's conduct had not been such as to debar him from asserting his rights.

*Held*, that it was a question to be tried at the hearing whether the only real object of the Commissioners as to the part of *Butler's Alley* adjoining the Plaintiff's houses was not to lower its level, and whether the minute widening of that street was not merely colourable, and proposed in order to give them power to purchase under their Act, which gave them a power

(1) Law Rep. 2 Ch. 1.

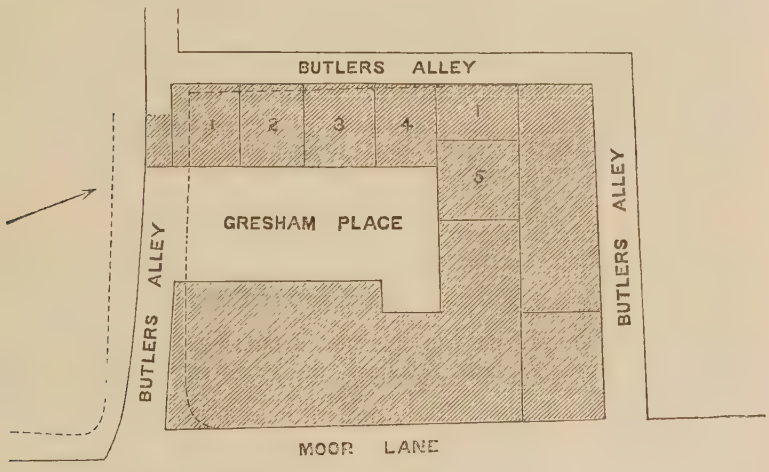
of compulsory purchase for the purpose of widening streets, but not for the purpose of altering levels.

*Held*, therefore, that the Commissioners ought to be restrained, till the hearing or further order, from proceeding to assess the value of the Plaintiff's houses.

An adjudication of the Commissioners that a certain property is required for the purpose of alterations cannot be supported if there are no grounds on which any reasonable person could come to the conclusion that it was so required.

The Commissioners cannot validly adjudicate that a property is required for the purposes of an improvement until they have determined what the improvement is to be, so far as to furnish materials for judging whether the property is required.

THE Plaintiff was the owner in fee of six adjoining houses, Nos. 1, 2, 3, 4, and 5, *Gresham Place*, and No. 1, *Butler's Alley*, in the City of *London*.




On the 2nd of December, 1884, the Commissioners of Sewers passed a resolution for "that the improvement of *Butler's Alley*, in the City of *London*, and for the public advantage, and in pursuance of the powers vested in them by statute 57 Geo. 3, c. xxix., this Court do forthwith alter, widen, and extend the said street called *Butler's Alley*. And the Court do adjudge that the houses, buildings, and tenements known as Nos. 1, 2, 3, 4, and 5 *Gresham Place*, and No. 1, *Butler's Alley*, and the land whereon the same stand, project into, obstruct, and prevent them from so altering,

C. A. 1886

LYNCH v. COMMISSIONERS OF SEWERS OF THE CITY OF LONDON.

widening, and extending the said street called *Butler's Alley*, and that the possession, occupation, and purchase of such houses, buildings, and tenements, and of the land whereon the same stand will be necessary for that purpose; and that this Court do order their solicitor to treat, contract, and agree with the owner or owners, occupier or occupiers of the said houses, buildings, and tenements, and of the land whereon the same stand, for the purpose aforesaid in pursuance of the said Act."

The solicitor of the Commissioners accordingly, on the 15th of December, served the Plaintiff with a notice which stated that the Commissioners, in pursuance of their powers, "do intend forthwith to alter, widen, and extend the street called *Butler's Alley*, in the said city, and for such purpose require to purchase and take all your estate and interest in all those houses," &c. [describing the six houses.] The notice went on to state that the solicitor had been authorized by the Commissioners to treat with the Plaintiff, and required the Plaintiff to treat with him, and demanded from the Plaintiff particulars of his estate and interest, and of the claim made by him in respect thereof "pursuant and according to the form of the statute 57 Geo. 3, c. 29, entitled," &c.

On the 19th of January, 1885, the Plaintiff sent in a claim for £2500, and a negotiation commenced between the surveyors of the two parties. The Commissioners offered £1320, which was declined, but in March the Plaintiff's surveyor intimated that £2300 might perhaps be accepted. In April, the surveyor of the Commissioners offered £1600, and proposed in the alternative that the value should be referred to arbitration. Both offers were declined. In August, he said £2300 might be given to facilitate a settlement, but otherwise the case must go to a jury. In September, the Plaintiff's surveyor stated that £2400 would be accepted if certain costs were paid. The Commissioners declined this, and on the 21st of October gave notice for a jury. On the 26th the Plaintiff's solicitor wrote to the solicitor of the Commissioners stating that he was advised that the Commissioners did not need for the improvements the whole of the property mentioned in the notice to treat, and asking to be allowed to inspect the plans. On the 29th of October the

solicitor of the Commissioners wrote, "The Commissioners have duly adjudged that the whole of the premises in respect of which notice to treat has been given are required for the improvement of *Butler's Alley*. I have no plan of the proposed improvement, nor am I aware that any such has been submitted to the Commissioners." The Plaintiff's solicitor replied stating that his client did not wish more of his property to be taken than was necessary, and asking, in the absence of plans, for some evidence that the compulsory purchase of the whole was necessary. The solicitor of the Commissioners answered, that for evidence he could only refer to the Act of Parliament and the adjudication of the Commissioners. On the 17th of November the Plaintiff's solicitor asked for particulars as to the proposed widening of *Butler's Alley*. The solicitor of the Commissioners answered, "I believe the Commissioners intend to widen both on the south and west sides of your client's property, but I am unable to inform you of the extent of the widening determined on, beyond the fact that the Commissioners have adjudicated that the whole of your client's property is required for the improvement." On the 19th the Plaintiff's solicitor wrote to say that, according to a plan which had been forwarded to the Plaintiff's surveyor on the 13th of November, the house No. 5, could not possibly be required. The solicitor of the Commissioners replied that he knew nothing of the plan, and in other letters he gave it to be understood that the Commissioners had not finally settled their plans. On the 23rd of November, 1885, the Plaintiff's solicitor withdrew the offer to sell for £2500, and on the following day the writ in this action was issued for an injunction to restrain the Commissioners from proceeding under their notice to treat for the purchase of No. 5 *Gresham Place*, or other property belonging to the Plaintiff not necessary for the Commissioners' purposes, and from taking any proceedings to assess the amount of compensation to be paid in respect of such premises. On the day on which the writ was issued, the Plaintiff, by special leave, gave short notice of motion for an injunction.

The surveyor of the Commissioners deposed that in November, 1884, he prepared a plan to explain to the Commissioners his view as to the proposed improvements to be made in *Butler's*

C. A. 1886 LYNCH v. COMMISSIONERS OF SEWERS OF THE CITY OF LONDON.

*Alley*. The extent to which it was proposed to widen *Butler's Alley* where it adjoined the Plaintiff's property is shewn on the accompanying plan by a dotted line. As will be seen, a part of No. 1, *Gresham Place* was required, but as regarded the western boundary only a strip of the Plaintiff's property was included, tapering from a width of about twelve inches on the south to a point on the north. This witness deposed that the lines of improvement shewn on the plan would be subject to any such modifications or alterations as the Commissioners might determine upon. That it was intended so to alter and lower the levels of the various portions of *Butler's Alley*, that its level where it meets with *Gresham Place* and with the part of *Butler's Alley* which runs north should be considerably below the levels of those two places. That the Commissioners would shortly proceed to considerably lower the levels of both *Gresham Place* and the parts of *Butler's Alley* which ran north and south and east and west, and in order to alter such levels they would, in the deponent's judgment, have to lay bare parts of the foundations of the properties comprised in the notice to treat. That it was doubtful whether it would be safe to lay bare the foundations without pulling down the houses, and that as regarded No. 5, *Gresham Place* the deponent did not think that it would stand safely without additional support if No. 4 were pulled down.

The motion was heard before Mr. Justice *Kay* on the 17th of December, 1885.

*Hastings*, Q.C., and *J. Douglas Walker*, for the Plaintiff, moved for an injunction to restrain the Defendants—the Commissioners—from proceeding under the notice which they had given him to treat for the purchase of No. 5, *Gresham Place*, or other property belonging to him, and not necessary for their street improvements.

They referred to the case of *Teuliere* v. *Vestry of St. Mary Abbotts, Kensington* (1), where the vestry required, for the purpose of widening a street, a part of certain buildings and site of an orphanage, leaving a large part of the premises, and the Court held that as the owners of the property wished to sell only

(1) 30 Ch. D. 642.

the part required, the vestry could not take the whole. That decision governed this case, and shewed that the Commissioners of Sewers were not entitled to take more of the Plaintiff's property than they actually required for the purpose of the proposed improvements. There was also the case of *Gard* v. *Commissioners of Sewers of the City of London* (1), where the Court of Appeal, affirming the decision of this Court, held that the defendants had no power to adjudicate that they would take possession of the whole of a piece of land for the purpose of street improvements when they intended to use only a small part of it for that purpose. Those cases were in point, and they submitted that the Plaintiff was entitled to the injunction which he asked for.

*W. Pearson*, Q.C., and *John Henderson*, for the Defendants, submitted the cases referred to were distinguishable from this, as the Plaintiff had entered into negotiations upon the basis of the notice by the Defendants to treat for the purchase, and he had by so doing precluded himself from taking any objection to the validity of it. No injunction to restrain the Defendants from proceeding upon their notice ought therefore to be granted: *Thomas* v. *Daw* (2).

*Hastings*, in reply, submitted that the case of *Thomas* v. *Daw* was no authority, as it seemed to have been decided by Vice-Chancellor *Kindersley* (3) upon facts not disclosed in his judgment as reported.

KAY, J.:—

The Defendants are a public body intrusted with very large powers and duties, which, however, they do not, and cannot, exercise for any purpose of profit to themselves, and in that respect the Defendants are very different from an ordinary trading or joint stock company, or a body like a railway company, which may have compulsory powers that they can exercise for their own benefit. It is extremely important when a question like this is raised that the Court should be very careful how it

(1) 28 Ch. D. 486. (2) Law Rep. 2 Ch. 1.
(3) Law Rep. 2 Ch. 2, n.

C. A. 1886 — LYNCH v. COMMISSIONERS OF SEWERS OF THE CITY OF LONDON. — Kay, J.

interferes with a body like the Commissioners of Sewers. In my opinion the Court ought not to interfere unless a very clear case for it has been made out by the plaintiff. The nature of the case is this: The Commissioners of Sewers made, under their powers with which we are now pretty familiar, an adjudication to the effect that they adjudged the houses, buildings, and tenements known as Nos. 1, 2, 3, 4, and 5, *Gresham Place*, and No. 1, *Butler's Alley*, and the land whereon the same stood, did project into, obstruct, and prevent them from so altering, widening, and extending the said street called *Butler's Alley*, and that the possession, occupation, and purchase of such houses, buildings, and tenements, and of the land whereon the same stood, would be necessary for that purpose; and the Court ordered their solicitor to treat with the owner, and so on. The Plaintiff is the absolute owner in fee simple. It appears from the affidavit of Mr. *William Haywood*, who was the engineer and surveyor to the Commissioners of Sewers, that what took place was this: A notification dated the 15th of December, 1884, was made to the owner shewing the situation and description of the property required, stating the nature of the property, and that it was held in small tenements. There the claim which the Plaintiff made for compensation on taking the houses is inserted at £2500. Mr. *Haywood* said: "On the 25th of January, 1885, I received from Mr. *Baylis*, the Defendants' solicitor, a claim by the Plaintiff for the sum of £2500, as compensation for the premises comprised in the notice to treat, and at once entered upon negotiations as to the price with Mr. *Walker*, the Plaintiff's surveyor, and the negotiations lasted from January to November, 1885. On the 29th of January, 1885, I offered Mr. *Walker* the sum of £1320 in settlement of the Plaintiff's claim. He declined that offer, but subsequently, in the month of March, he intimated that perhaps the sum of £2300 might be taken. In the month of April I made an offer of £1600, and proposed in the alternative that the amount of compensation should be determined by arbitration, but, both the propositions being declined, I intimated, about the 5th of August, 1885, that the sum of £2300 might be given in order to facilitate a prompt settlement, but otherwise that the question of compensation must be referred to a jury. On the 16th of

September, 1885, Mr. *Walker* wrote to me that his client had authorized him to accept the sum of £2400 for the property, but for the first time endeavoured to stipulate that the Commissioners should pay all the solicitor's preliminary costs, Mr. *Walker's* fee of thirty guineas, and another fee of twenty-five guineas for *Rowland Plumbe*, whose name had never been mentioned to me, and of whom I had never heard in connection with this case; and finding that, as my offers increased in amount, fresh demands were made, I advised the Defendants not to comply with the Plaintiff's demand, which seemed to me extravagant, but to have the compensation settled by a jury. During the whole of the negotiations Mr. *Walker* never intimated to me, nor did I ever hear, that the Plaintiff was desirous of keeping his property, or objected to dispose of it to the Defendants, nor that the Plaintiff objected to their taking more than a portion of his property; but, on the contrary, Mr. *Walker* appeared to be willing to sell the whole. It was only when it appeared that there was no chance of my acceding to what appeared to me an exorbitant demand for compensation for the property, that Mr. *Walker* asked for information as to the nature or extent of the improvements contemplated by the Defendants, and until I was informed of the letter sent by the Plaintiff's solicitor to Mr. *Baylis*, on the 26th of October, 1885, I never heard of any such objection or inquiry." So that the position is this: The owner in fee, receiving an intimation that his property was wanted by the Commissioners, endeavoured to obtain from them a larger price than they thought fit to give, extended the negotiation over some months, and never suggested that they had not a perfect right to buy it. When, however, he found that he could not exact the terms which he insisted upon, and that the Commissioners were determined to have the price fixed by a jury, he, for the first time, turned round and said, "Now I will object to your notice to treat altogether." Was that competent? Apart from any authority, it might be said that that was an excessively unreasonable, vexatious, and improper course for any person to take. It would seem that the objection to the notice was a mere afterthought, by way of putting an additional compulsion upon the Commissioners to give the Plaintiff the price he was asking; and I have no doubt that that was the reason why the objection

C. A. 1886 — LYNCH v. COMMISSIONERS OF SEWERS OF THE CITY OF LONDON. — Kay, J.

was raised by him. But the subject is not without authority, because I have what seems to me an extremely clear and plain decision of Vice-Chancellor Sir *Richard Kindersley* upon it in *Thomas* v. *Daw* (1). There is appended to the statement of the case, on page 2, a note of the judgment of the Vice-Chancellor, and it seems that two houses in that case were in question. Notice had been given to take both, when it clearly appeared that both houses were not in fact wanted. The Vice-Chancellor, as to one of the houses, decided that the Commissioners were wrong, and his decision was affirmed on appeal by Lord Chancellor *Chelmsford*. The Vice-Chancellor said (2): "With respect to No. 49, the plaintiffs had precluded themselves from complaining, by reason that, when they received the notice to treat, instead of insisting that the Commissioners ought to content themselves with taking the seven feet, they sent in a claim, thereby recognising their right to take No. 49. The plaintiffs said that they did not thereby recognise the right, because the notice to treat being merely formal, the claim was equally so; but it was admitted that the Commissioners had a right to take"—that is, it was admitted by sending in the claim, as I read the judgment—"or, at all events, that the plaintiffs were willing that they should take the whole. As to No. 49, therefore, the bill must be dismissed." There was no appeal on that point, and therefore it did not come before the Lord Chancellor; but of course the decision was one which I should not think of departing from. It was one which is completely binding—binding at least by the courtesy that Courts of equal jurisdiction always shew one another—upon me. I do not refer, as in any way confirming it, to what was said by Lord Justice Sir *R. Baggallay* in *Gard* v. *Commissioners of Sewers of the City of London* (3), a later case, but certainly he did refer in his judgment to the decision of Vice-Chancellor *Kindersley*, and stated it without intimating a word of objection. That is of some importance. The decision in *Thomas* v. *Daw* having been come to a good many years ago, has not been dissented from and not departed from, and is not contradicted by any other decision; therefore I take it to be completely binding. I understand the

(1) Law Rep. 2 Ch. 1. (2) Law Rep. 2 Ch. 3, n.
(3) 28 Ch. D. 486, 508.

decision to mean that, if an owner in fee simple, having received a notice to treat, does not object to that notice to treat, but negotiates and tries to get a large price for his property, and then, when he finds he cannot get that large price, turns round at the last moment and says, "Now I object to your notice to treat," he has precluded himself, whether the notice to treat were good or not, and is estopped from denying its validity. That is the ground on which I understand the Vice-Chancellor to have proceeded, and that decision, if it is to be altered at all, must be altered by a higher authority than this Court. Therefore it seems to me that that is a complete answer to the case on the part of the Plaintiff. I should, as I have before said, be extremely disinclined, even if there were not that authority, to allow the Plaintiff in this vexatious manner to interfere with the exercise by the Commissioners of Sewers of their powers. I have no doubt, from the evidence before me, that the Commissioners' powers were perfectly and honestly exercised. I am not at all convinced, from any evidence before me, that they may not have been quite right in giving the notice which they gave; but of course I should not decide the matter on that ground alone. If that were the only point, I might be compelled to leave it to be decided at the trial of the action, and to preserve the *status quo* in the meantime. When, however, this question, which has been the subject of actual decision, is brought to my attention, it seems to me to be purely a case in which the Court ought not to interfere and to embarrass a public body like the Commissioners of Sewers by restraining or hindering them from carrying out that which, according to Vice-Chancellor *Kindersley's* decision, whether the notice was originally right or not, they have, as against the Plaintiff, an entire right to carry out in the way they proposed. Accordingly I refuse the motion with costs.

T. F. M.

C. A.

The Plaintiff appealed, and the appeal was heard on the 17th of February, 1886.

*Hastings*, Q.C., and *J. Douglas Walker*, for the Plaintiff:—

As regards the ground on which Mr. Justice *Kay* decided against us, viz., that we sent in a claim, we must proceed on the

C. A. 1886 LYNCH v. COMMISSIONERS OF SEWERS OF THE CITY OF LONDON.

assumption that the Defendants' notice was invalid, and if the decision is supported it must be on the ground, either that the Plaintiff's sending in a claim turned a bad notice into a good one, or that the Plaintiff estopped himself from saying that it was a bad one. The first ground is clearly untenable. As to the second, we say that the claim only comes to this: "If you will give me £2500 for the property, I will waive all objections and let you have it." They, after much negotiation, refuse to give that sum, and the Plaintiff is remitted to his original rights. If the Plaintiff had led them to altering their position there might have been a case of estoppel.

[COTTON, L.J.:—If you did not know what the improvements were which the Commissioners intended to make, I do not see how you can be treated as having waived any right. The Lord Justice *Fry* has referred me to a report of *Thomas* v. *Daw* (1), the case on which Mr. Justice *Kay* relies, from which it appears that the plaintiff knew all along what the plans were.]

If we are not estopped then the case is clearly one for an interlocutory injunction, and Mr. Justice *Kay* intimated that, but for the point on which he decided against us, matters ought to be kept *in statu quo* till the trial.

*W. Pearson*, Q.C., and *John Henderson*, *contrà*:—

If the Commissioners adjudicate that a particular property is necessary for works they are going to do, the Court will not interfere, though it can interfere if they define certain works which they are going to do, and it can be shewn that the property is not necessary for them. *Thomas* v. *Daw* (2) clearly lays down that if the Commissioners adjudge that the taking of the land is necessary the Court will not interfere.

[BOWEN, L.J.:—Cannot the Plaintiff challenge the *bona fides* and say, "According to your plan, you do not want this property."]

In *Gard* v. *Commissioners of Sewers of the City of London* (3)

(1) 14 W. R. 300. (2) Law Rep. 2 Ch. 1.
(3) 28 Ch. D. 486, 506, 507.

Lord Justice *Baggallay* fully adopts the view of Lord *Chelmsford* in *Thomas* v. *Daw* (1).

[FRY, L.J.:—As Lord Justice *Baggallay* says, the power must be exercised honestly in the sense of believing that they may require the property for the purposes of improvement. I think, moreover, that it is necessary for this belief to be one which the circumstances of the case render reasonable.]

The statute 57 Geo. 3, c. xxix., s. 80 (2), gives power to alter, extend, and level streets, and to take lands compulsorily for those purposes, and the *City of London Sewers Act*, 1848 (11 & 12 Vict. c. clxiii.), provides more expressly for altering levels. Our evidence shews that the property included in our notice was reasonably wanted for those purposes. The condition, therefore, is satisfied, and if there is reasonable ground for belief that the land will be wanted then the adjudication is conclusive. Moreover, *Thomas* v. *Daw* shews that the sending in a claim is a waiver of the objections to a notice to treat, and here there were negotiations for months.

[FRY, L.J.:—In *Thomas* v. *Daw* the plaintiff knew the plans all along. The Plaintiff here did not, and if the statement in your notice that the houses are required for the improvements be untrue, you have misled him into negotiations.]

COTTON, L.J.:—

In deciding the question which is before us, we must remember that this is only an application for an interlocutory injunction, and we do not finally decide what are the rights of the parties.

The Plaintiff is the owner of five houses in *Gresham Place* and one house in *Butler's Alley*. The Commissioners, acting under the Act of 57 Geo. 3, c. xxix., and the *City of London Sewers Act*, 1848, are making arrangements for improvements in this quarter by pulling down the southern part of *Butler's Alley*, which runs east and west, and they are proceeding to widen it. They have also some plans as regards the other portions of *Butler's Alley* and as regards *Gresham Place*. Early in December, 1884, they came to a resolution that they would do something in *Butler's Alley* and

(1) Law Rep. 2 Ch. 1. (2) Set out 28 Ch. D. 487–8.

C. A. 1886 — LYNCH v. COMMISSIONERS OF SEWERS OF THE CITY OF LONDON. — Cotton, L.J.

*Gresham Place*, and they served on the Plaintiff a notice: "The Commissioners, in pursuance of the powers enabling them in that behalf, do intend forthwith to alter, widen, and extend the said street, called *Butler's Alley*, in the said city, and for such purpose require to purchase and take all your estate and interest in all those houses," mentioning the houses to which I have already referred. That was a representation that the altering, widening, and extending the street which they were proposing to effect required the purchase of the houses referred to in the notice. Mr. *Lynch* thereupon sent in a notice claiming £2500 for the property, and he stated what his interest was, and all the particulars required, how the houses were let, and who would act as agent for him. After an interval of some months the parties could not agree as to what the price should be, and the Commissioners proceeded to summon a jury. The Plaintiff then ascertaining, as far as he could, what the plans of the Commissioners were, objected that under the Act they had no power to take these houses. Mr. Justice *Kay* decided that, having regard to these negotiations and especially to the answer which the Plaintiff sent in to the notice to treat, a Court of Equity would not help him by granting an injunction, even if his objection were valid. But, in my opinion, with great respect to the learned judge, that conclusion was erroneous. If it appeared that the Plaintiff had gone on during these months with full notice of the objection which he afterwards took, I should have been inclined to think that his conduct prevented him from coming for an injunction, but on the facts before us we ought not, in my opinion, to come to the conclusion that he knew what the improvements in fact were. The notice to him is, that the Commissioners intend to alter, widen, and extend the street called *Butler's Alley*, and that for that purpose they require to purchase and take all the Plaintiff's estate and interest in certain property. Was not he justified in relying upon that statement? There might be alterations and improvements in *Butler's Alley* which would render the taking of these houses necessary, and would give the Commismissioners power under their Act to take them. There clearly might be alterations which would require all the houses except No. 5, *Gresham Place*, and it might even be possible to make

in *Butler's Alley* alterations which would require the space occupied by that house. Now, in my opinion, we ought not to come to the conclusion that the Plaintiff during the negotiations knew anything as to the nature of the proposed improvement, since the plan was sent to him only in November, 1885, after the negotiation had come to a conclusion, and the parties were standing at arm's length. That was the plan which was put before the Commissioners on the 2nd of December when they came to the resolution that they would widen and alter *Butler's Alley*. Their solicitor in his letters treats them as not bound by any plan, and shews that in fact they had not finally determined what they would do. It would be wrong then to impute to the Plaintiff any knowledge that what they were going to do did not make the purchase of all his houses necessary.

The question we have to determine is whether the Commissioners have power under the Act to take compulsorily all these houses. I do not say anything about the notice to treat, because the Act does not require one. *The City of London Sewers Act*, 1848, sect. 120, empowers the Commissioners to alter the level of the streets, but does not give them any power to take property compulsorily for that purpose. The power to take these houses depends entirely on 57 Geo. 3, c. xxix., s. 80, which enacts that it shall be lawful for the Commissioners, &c., from time to time "to alter, widen, turn, or extend any of the streets or other public places within any such parochial or other district (except turnpike roads), and to lengthen and continue or open the same from the sides or ends of any streets or public places within any parochial or other district, into any other street or public place within such or any other parochial or other district, and to raise, level, lower, drain, ballast, gravel, or pave such new part or parts of any such streets or public places so altered, widened, extended, opened, or lengthened as aforesaid." In my opinion, under this clause, the power of altering the level applies only to those streets which are in other respects altered. "Altered," having regard to the context, does not include altering the level, that is—lowering or raising. Then we come to the only part of the section which gives power of compulsory purchase, "And that if any houses, walls, buildings, lands, tenements, and hereditaments, or any part

C. A. 1886 LYNCH v. COMMISSIONERS OF SEWERS OF THE CITY OF LONDON. Cotton, L.J.

thereof, shall be adjudged by the said Commissioners or trustees or other persons as aforesaid to project into, obstruct, or prevent them from so altering" (that is not lowering or raising), "turning, widening, extending, lengthening, continuing, or opening the said streets or public places within the said parochial or other district," then they have power to treat for those lands, and if they cannot get them by arrangement then they may go to a jury. In my opinion, therefore, there is no power at all to take, against the will of the owners, houses which are required only for the purpose of raising or lowering the streets, and not for the purpose of otherwise altering them.

Here the Commissioners, on the 2nd of December, 1884, adjudicated that these houses were required for altering, widening, and extending *Butler's Alley*. It is said that that is final and conclusive, and that whether these houses are or are not, when the facts are known, reasonably required for alterations for the purposes of which they had power under the Act to take the houses, the Plaintiff cannot raise any objection. The case is one to be decided at the hearing, because it is a question of very great doubt at the least whether the adjudication can be supported. The Defendants rely upon the decision of Lord *Chelmsford*, in *Thomas* v. *Daw* (1), which they say was approved of by Lord Justice *Baggallay* in *Gard* v. *Commissioners of Sewers of the City of London* (2). Lord Justice *Baggallay* in the latter case says this (3): "Now it appears to me, that if the Commissioners honestly (I do not use the word 'honestly' in contradistinction to dishonestly, but honestly in the sense of believing they may require the entirety of the property for the purpose of improvement) come to the conclusion that the possession of the whole of the property, and not merely of the part which would interfere with the improvement, is necessary for the purposes of the improvement, the words of this section are wide enough to enable them to make an adjudication to that effect." The learned counsel for the Commissioners of Sewers, said "Can you hold that this was done dishonestly?" That, Lord Justice *Baggallay* says, is not the question; but whether they acted honestly in

(1) Law Rep. 2 Ch. 1. (2) 28 Ch. D. 486.
(3) 28 Ch. D. 507.

the sense of believing that when they come finally to their determination this property will be required for the purpose of the alteration. Till they have made their plan how can they honestly decide whether a particular property is wanted. Now, under the Act, if part of a house (this is my present impression), interferes with their scheme they can take either part or the whole. But let us see what, at this stage of the cause, is a proper conclusion as to the improvements which they intend to make. A plan is produced, though they say they do not bind themselves by it. It shews a substantial interference with No. 1, *Gresham Place*, and then up the west side of the houses including the back court of Nos. 2, 3, and 4, *Gresham Place*, and carried up to No. 1, *Butler's Alley*, there is a line of red which shews what they then contemplated to be the extent of their widening *Butler's Alley*. This line hardly includes any portion of the site of No. 1, *Butler's Alley*, and in the northerly half of that house it is hardly possible to distinguish the red line from the boundary line of the property. What we find on the evidence of their surveyor is, that what they are really proposing to do here, even if there is to be an infinitesimal widening of *Butler's Alley*, is to lower the level of *Gresham Place* and *Butler's Alley*, so as to make it agree with the level of the new street, which I will call *Butler's Street*, which includes the southern part of *Butler's Alley* running east and west. For that purpose they have no power, in my opinion, under this Act of Parliament, to take any land at all. Therefore the question which will arise is whether, under guise of widening *Butler's Alley*, they are not taking these houses, not for that purpose, but for the purpose of lowering the level which they could not otherwise effectually do, a purpose for which, unless they are widening, they have no power of taking any land against the will of the owner. How it could be said that No. 5, *Gresham Place*, was necessary even for the purpose of lowering *Butler's Alley*, it is difficult to say, since it in no way adjoins *Butler's Alley*. It is said that this house would come down if it were separated from No. 1, *Butler's Alley*. But that is not what the Act provides for. If the owner says, "I will not sell it," they have no power, as I understand the Act, to buy the house, simply because the consequence of their improvement would be that it would come down

C. A. 1886 LYNCH v. COMMISSIONERS OF SEWERS OF THE CITY OF LONDON. Cotton, L.J.

or be materially injured. It is not necessary for the purpose of effecting the improvements for which they had power to take houses under the Act. If no compensation is payable by them for damage done to property which they do not take, it might be a benefit to those who would be injured by their taking what they have taken, that the house which is injured should also be taken, but that does not give them power to take it if the owner objects. If the Commissioners are liable to compensate for damage to property, it might be a benefit to them to take the house, but that does not make it reasonable for them to adjudicate that it is necessary for the purposes for which they can take land and houses under the Act.

In my opinion therefore, on the facts now before us, we ought to consider that what was before the Commissioners when they came to the resolution of the 2nd of December, 1884, was not the widening of *Butler's Alley*, and that they did not reasonably come to the conclusion that these houses were required for enabling them to carry out improvements for the purposes of which they can take land compulsorily. Of course at the hearing a different state of things may be established, and it may be shewn that the Plaintiff is not entitled to rely upon these considerations, but upon this interlocutory application, and on the evidence now before us, we ought, in my opinion, to differ from the decision of Mr. Justice *Kay*, and to say that the Plaintiff is entitled to an injunction.

BOWEN, L.J.:—

In the first place we have to consider what are the powers of the Commissioners under 57 Geo. 3, c. xxix., s. 80. The section confers on the Commissioners in the first place power and authority with respect to the streets and public places which are not private property. They may "alter, widen, turn, or extend any of the streets or other public places." Then there is power to "raise, level, lower, drain, ballast, gravel or pave such new part or parts of any such streets or public places so altered, widened, extended, opened, or lengthened as aforesaid." The power to level is not a power conferred, except in cases where there is a street or part of a street or public place "altered, widened,

extended, opened, or lengthened," from which it clearly appears that the power to alter streets does not confer power to alter the level, unless the street is in the first instance altered in some other way, either by extension or by widening or turning. Then comes the part of the section which confers upon them the power to interfere with private property. That interference with private property is confined to a case where the Commissioners adjudge houses or lands, or some part of houses or lands "to project into and obstruct or prevent them from so altering, turning, widening, extending, lengthening, continuing or opening the said streets or public places," that is to say, they may not take houses or lands for the purpose of lowering the level, or draining, or gravelling, or paving, they may only do so if they want to alter the street itself or public place by widening, turning, or extending it. It is obvious to my mind therefore that upon the true construction of this Act the Commissioners have no power to take houses or lands simply for the purpose of altering the levels, and in order to take lands for the purpose of widening the street, there must be a *bonâ fide* belief that the widening of the street is wanted for the improvement of the street or public place within the first words of the section.

Supposing then that the Commissioners adjudicate that houses or lands "project into and obstruct or prevent them from so altering" the street, what is the effect of their adjudication? It has been urged that it is final, and that we cannot go behind it. The contrary to that was distinctly decided in *Gard* v. *Commissioners of Sewers of the City of London* (1). In that case it was decided not merely that the adjudication in order to be final must be an honest and *bonâ fide* adjudication, but also that it must be an adjudication which bore some relation to reason, and that the Commissioners could not clothe themselves with jurisdiction to take a man's property by only thinking that which it was unreasonable for any sensible man to think. That was the construction placed upon the section by Lord Justice *Baggallay*, the same construction was expounded by myself; and the Lord Justice *Fry*, who gave a shorter judgment than Lord Justice *Baggallay* or myself, stated that he entirely concurred in the reasoning of the

(1) 28 Ch. D. 486.

C. A. 1886

LYNCH v. COMMISSIONERS OF SEWERS OF THE CITY OF LONDON.

Bowen, L.J.

Lords Justices who had preceded him. Therefore, the argument that the adjudication is necessarily final cannot be successful.

Now, applying that law to this case, how does it stand? At the time the adjudication was made it appears to me extremely doubtful whether the Commissioners had come to a conclusion—I will not say as to what they were ultimately going to do, because I do not think it necessary that at the time of the adjudication every detail of their future plans should be settled in their own minds—but it is doubtful whether (and this I think is necessary to make the adjudication valid within the meaning of the Act), they had come to a conclusion upon so much of their plan as was necessary to furnish them with materials for thinking that the pulling down of the houses in question was necessary for the purpose of widening the street, or, in other words, for thinking that the houses project into, and obstruct or prevent them from altering or widening the street in the way in which they mean to alter or widen it. I very much doubt whether the case will not turn out to be this—that the real object of the Commissioners was to alter the level of the branch of *Butler's Alley* which runs north and south, and being perfectly aware that they could not take land or houses compulsorily for the purpose of altering the level, and being also aware that they might in the manner prescribed by the Act clothe themselves with power to take these houses, they thought they would widen the alley just enough to clothe them with the jurisdiction to take the houses, and thereby enable themselves to alter the level, and they then made an adjudication to cover themselves under the Act. If that case be made out at the hearing, it will, I think, be a question, and a serious question, whether that is a *bonâ fide* exercise of the powers of the section. When we look at the plan, it appears that only a very small portion of No. 1, *Gresham Place*, is going to be taken, less of No. 2, less still of No. 3, of No. 4 a portion which I will call minute, and of No. 1, *Butler's Alley*, a portion so minute that it is hardly discernible with the naked eye. I have not the measurements or the means of measuring upon the map, but I cannot help feeling some doubt as to whether it can be said to be reasonably necessary to take any part of No. 1, *Butler's Alley*, for the purpose of widening *Butler's Alley*, still more whether it is open to the

Commissioners to say that they want No. 5, *Gresham Place*. That house does not abut upon the alley at all, and the only way in which they can make out that they want No. 5 for the purpose of widening the alley is, by the circuitous route of proving first that they want to take a bit of No. 1, *Butler's Alley*, and then that if they take down a part of it the whole of it must come down, and if it comes down No. 5, *Gresham Place*, will fall for want of support. That may be, but a man has the right to waive that which is for his own benefit, and on the face of the map and the affidavit it seems to me extremely doubtful whether the Commissioners are not exceeding their powers in this instance. If so, the Plaintiff has the right, unless he has done something to lose such a right, to come to this Court and ask us to prevent that question being settled against him by the destruction of his property until the hearing of the action.

I now come to the point which the learned Judge below decided against the Plaintiff and dismissed this application. The question here is not strictly speaking as to the legal validity of the notice to treat, for legal validity is hardly the term to apply to a document which has no statutory character. The real question is as to the right of the Commissioners to put in motion their powers under this section. It is perfectly certain that a man may so conduct himself that, even if he has undoubted rights, he may be precluded by his conduct from insisting upon them. If the Commissioners originally had no power to take this property, I do not say that there might not be such conduct on the part of the Plaintiff as would prevent him from afterwards coming to ask the Court to interfere for his protection. He might so act as to lead the Commissioners into a trap by something which would justify them in believing that he did not intend afterwards to inquire into the legal validity of the acts which they were doing, and they might be led to alter their position upon the strength of that belief, but where a man, as far as we can see, has a clear right to test what the Commissioners are doing, and to insist that he is being wrongfully deprived of his property, it would require a rather strong case to lead us to say that he has so conducted himself as to prevent his afterwards claiming and insisting upon that right. There is no doubt something to be said about the time

C. A. 1886 LYNCH v. COMMISSIONERS OF SEWERS OF THE CITY OF LONDON.

Bowen, L.J.

during which these negotiations were protracted, but upon the whole view of the case, remembering that the onus of proof rests as I think upon the Commissioners, I cannot see that they have shewn any conduct of the Plaintiff which makes it unjust that he should now insist upon whatever rights he has. The Commissioners may at the hearing, for anything I know, be able to strengthen their case in that respect, and to shew that the Plaintiff has done more than we at present see, but upon the present evidence I agree entirely with the judgment which the Lord Justice has just delivered.

FRY, L.J.:—

It appears to me that there is a very serious question for trial at the hearing of this cause. I take it to be clear upon the construction of the 80th section of the statute 57 Geo. 3, c. xxix., that the Commissioners cannot take land or houses for the purpose merely of lowering the levels of the streets which they do not widen or alter, and in fact I think it has hardly been contended that they could do so. Now if that be so, it appears to me to be plain that the inquiry then is, whether these houses are really being taken for the purpose of widening that portion of *Butler's Alley* which has been called *Butler's Street*, or whether they are really being taken for the purpose of lowering the levels of the part of *Butler's Alley* which runs northwards, and of *Gresham Place*. The evidence of Mr. *Haywood* convinces me that substantially those houses are to be taken because the lowering of the levels of those two pieces of ground, viz. *Butler's Alley* and *Gresham Place* will endanger, as he says, the foundations of these houses. It appears to me to be plain, therefore, that there is a very serious question, to say the least of it, whether the Commissioners can take those houses for that purpose. It is said, indeed, that the Commissioners have the intention to widen what I will call the northern arm of *Butler's Alley*, and they have shewn a red line upon the plan which was sent by the Commissioners to the Plaintiff indicating a slight widening of that alley; but it is to be borne in mind that the utmost extent of widening which is proposed is twelve inches, and that tapers off to nothing as you pass northwards. Now I can hardly consider a widening of that

description a *bonâ fide* widening of the alley—at all events it is a very doubtful point whether it can be so considered. If it be not a *bonâ fide* widening, then it appears to me that the Commissioners are endeavouring to use the powers which they have in cases where they widen, in a case in which they are substantially not widening.

It has been pressed upon us that the adjudication of the Commissioners is conclusive, and that we cannot go behind it. It appears to me, as it has been already expressed by Lord Justice *Bowen*, that that argument is precluded by the decision of this Court in *Gard* v. *Commissioners of Sewers of the City of London* (1), and that the question is open for consideration whether the circumstances fairly warrant the proceeding on the part of the Commissioners.

One other observation I must make, which is this: that if the Commissioners find themselves placed, as I think they are placed, in a position of some difficulty, the difficulty is, in my opinion, entirely due to the course which they have thought fit to pursue. Whether it is necessary for them to do so or not, I am clear that the proper and business-like course for the Commissioners to pursue is first to determine the general nature of the operation which they desire to carry into effect—the general nature of the widening or levelling, or whatever it may be which they desire to accomplish. It is to be observed that it is only if any houses or buildings shall "project into and obstruct or prevent them from so altering, turning, &c., or opening the said streets or public places" that they have this power. Therefore it is open to inquiry whether they can determine that a house prevents them from "so altering" until they have determined what the alteration is to be. As to whether that be a condition precedent to their determination in point of law, I do not desire to express any opinion; but I do say this, that the only straightforward, business-like way is first to determine what the operations are to be, and then determine whether the houses prevent, or obstruct, or interfere with them. If the Commissioners had thought fit to pursue that course, and had made a disclosure of their plans to

(1) 28 Ch. D. 486.

C.A 1886

LYNCH v. COMMISSIONERS OF SEWERS OF THE CITY OF LONDON.

Fry, L.J.

the Plaintiff, they would have been in a very different position from that in which they find themselves now.

I will only add one or two observations upon the point which the learned Judge in the Court below decided, viz., that the conduct of the Plaintiff precluded him from taking advantage of the present objection. The learned Judge proceeded upon the authority of Vice-Chancellor *Kindersley*, in *Thomas* v. *Daw* (1), with regard to the house No. 49 there mentioned. It appears to me that if that case is looked into carefully, it will be seen to be no authority upon the present one. The plaintiff there had full knowledge of the line upon which the Commissioners desired to proceed; they had written to him insisting upon adhering to that line. That line was apparent to the eye of anybody who walked along the street, because the other houses had been put back to it, and with that knowledge the plaintiff thought fit to make a claim in respect of the entire house. In the present case no knowledge on the part of the Plaintiff is shewn; and having regard to the letters which were written by the solicitor for the Defendants, after the plan had been communicated, in which he threw doubt upon the binding nature of that plan, and asserted that the Commissioners had not made up their minds, it is extremely difficult to see how the Plaintiff could be affected with any knowledge of the Defendants' intentions, those intentions being kept as vague as it was possible to keep them. I think, therefore, the injunction ought to go because there is a serious question to be tried at the hearing.

An injunction was granted till the hearing or further order as to all the houses, except No. 1, *Gresham Place*.

Solicitor for Plaintiff: *R. H. Harris.*
Solicitor for Defendants: *E. A. Baylis.*

(1) Law Rep. 2 Ch. 1; 14 W. R. 300.

H. C. J.

## GREEN *v.* PATERSON.

C. A.
1886
Feb. 19, 20.

[1878 G. 196.]

*Disentailing Assurance of Copyholds—Declaration of Trust—Non-entry on Court Rolls—Settlement of Copyholds—Covenant to surrender—Post-nuptial Settlement—Consideration as between Husband and Wife—Interchange of Estates—Children of the Marriage—Volunteers—Fines and Recoveries Act* (3 & 4 *Will.* 4, *c.* 74), *ss.* 40, 41, 47, 50, 53 [*Revised Ed. Statutes, vol. viii., pp.* 499, 500, 502, 503]—27 *Eliz. c.* 4 [*Revised Ed. Statutes, vol. i., p.* 649].

A *feme coverte* entitled to an equitable estate tail in copyholds at *B.* executed, in February, 1870, a deed declaring that such copyholds should be held in trust for such persons as she and her husband should jointly appoint, and in default for herself in fee. The deed was duly acknowledged but was not entered upon the Court rolls of the manor within six months after execution.

By a deed of settlement dated in March, 1870, she and her husband, purporting to exercise this joint power, appointed the copyholds at *B.*, and also covenanted to surrender those and other copyholds to which she was entitled in fee, to trustees upon trust to sell, invest the proceeds, and hold the fund (in the events which happened) for her for her separate use for life, then for her husband for life, and then for her children other than her eldest son.

No sale or surrender of any of the copyholds was ever made. The *feme coverte* had several children, and after the deaths of her and her husband the trustee of the settlement petitioned that all the copyholds might vest in him for all the estate therein of the eldest son and customary heir, who was an infant, and *Hall*, V.C., made a vesting order according to the prayer of the petition :—

*Held*, first, that the deed of February, 1870, being a mere declaration of trust by the tenant in tail, and not a "disposition" within the *Fines and Recoveries Act*, was inoperative as an assurance to bar the estate tail in the copyholds at *B.*:

*Held*, secondly, in concurrence with *Honywood* v. *Foster* (1) and *Gibbons* v. *Snape* (2), and upon the construction of the statute, that, taking sect. 41, together with sects. 50 and 53 of the *Fines and Recoveries Act*, a disentailing assurance by an equitable tenant in tail of copyholds, which is not entered upon the Court rolls of the manor within six months after execution, is void; and consequently that the power of appointment which the deed of February, 1870, purported to create could not be exercised :

*Held*, thirdly, that the settlement of March, 1870, was not a disposition

(1) 30 Beav. 1. (2) 1 D. J. & S. 621.

C. A.
1886
GREEN
v.
PATERSON.

by the *feme coverte* within the Act, and could not be treated either as an assignment of her equitable interest in the copyholds or as a valid declaration of trust, or as anything more than a mere covenant to surrender:

*Held*, fourthly, that the petition for a vesting order must be treated as an action by the persons interested under the settlement to enforce the covenant therein contained for the surrender and settlement of the copyholds, and that although the interchange of estates between the husband and wife imported a valuable consideration as between them, the settlement being post-nuptial was voluntary as regarded the children of the marriage, who were strangers to the contract, and consequently that the Court would not interfere in their favour, and the order appealed from must be discharged.

## PETITION.

Before the execution of the next stated indenture, *Martha Green*, the wife of *John Major Green*, was tenant in fee on the rolls of one moiety of certain copyholds of the manor of *Braintree*. She was also entitled to admittance as heiress-at-law of her deceased mother to copyholds of the manors of *Badmondisfield* and *Giffords*, to which her mother had been admitted in fee. Her beneficial interest in the moiety of the *Braintree* copyholds was for an estate tail only. In the others she had the absolute interest both legal and equitable.

By an indenture, dated the 6th of September, 1869, and made between *Henry Revel Homfray*, of the first part, *John Major Green* and *Martha Green*, his wife, of the second part, and trustees of the third part, which indenture was executed under the sanction of the Court in order to carry into effect an agreement for the compromise of litigation between *Henry Revel Homfray* (the father of Mrs. *Green*) and Mr. and Mrs. *Green*, with reference to certain freehold and copyhold hereditaments, including copyholds held of the manors of *Braintree*, *Badmondisfield*, and *Giffords*, it was declared and agreed that certain assurances should be effected for the purpose of raising certain sums of money to provide (*inter alia*) for the costs of the litigation, and, subject thereto, that such freehold and copyhold hereditaments should remain and be assured to *Henry Revel Homfray* during his life and after his death to Mrs. *Green* in fee.

This deed was not acknowledged by Mrs. *Green* under the *Fines and Recoveries Act*.

By a disentailing assurance, dated the 28th of February, 1870,

Mrs. *Green*, with the consent of her father, purporting to act as protector of the settlement, and of her husband, *John Major Green*, for the purpose of barring her estate tail therein declared that the moiety of the *Braintree* copyholds should, subject to the life interest of the said *H. R. Homfray*, be held in trust for such persons as she and her husband should jointly appoint, and in default of appointment for her in fee.

This deed was duly acknowledged by Mrs. *Green*, but it was not entered upon the rolls of the manor within six months after execution.

By an indenture of settlement dated the 1st of March, 1870, and made between Mr. and Mrs. *Green* of the one part, and trustees of the other part, after reciting (*inter alia*) that they were desirous of making such settlement as thereinafter contained, it was witnessed, that for effectuating such desire, Mr. and Mrs. *Green* assured to the trustees and their heirs the freehold hereditaments above mentioned (subject to the life interest of *H. R. Homfray* therein) to the use of the trustees in fee; and Mr. and Mrs. *Green*, purporting to act in exercise of the power of appointment limited by the disentailing assurance, appointed and granted to the trustees, their heirs and assigns, the said moiety of the copyhold hereditaments held of the manor of *Braintree*, and also covenanted with the trustees that they and all other necessary parties would at the cost of the trust estate well and effectually surrender (*inter alia*) the above mentioned copyhold hereditaments respectively held of the manors of *Badmondisfield* and *Giffords* in the county of *Suffolk*, and also the moiety of the said copyhold hereditaments held of the manor of *Braintree*, to the use of the trustees, their heirs and assigns, according to the custom of the same manors, and it was thereby declared that the trustees should stand possessed of all the said freehold and copyhold hereditaments and shares of hereditaments upon trust after the death of the said *Henry Revel Homfray*, or in his lifetime with his concurrence, and in either case with the consent of Mr. and Mrs. *Green* or the survivor of them, during his or her life, and afterwards at the discretion of the trustees, to sell all the said premises, and to stand possessed of the proceeds upon trust for investment, and during the joint lives of Mr. and Mrs. *Green* to pay the

C. A. 1886 GREEN v. PATERSON.

income to Mrs. *Green* for her separate use without power of anticipation, and after the death of either of them to pay the income to the survivor of them during his or her life, and after the death of the survivor to stand possessed of the trust funds and the income thereof in trust for the children or child of Mrs. *Green* as she should by deed or will appoint, and in default of such appointment in trust for all and every the children of Mrs. *Green* who being sons should attain the age of twenty-one, or being daughters should attain that age or marry (other than an eldest son), in equal shares if more than one, and in default upon the trusts therein mentioned.

This last-mentioned indenture was duly executed and acknowledged as required by the *Fines and Recoveries Act*, 3 & 4 Will. 4, c. 74. *Henry Revel Homfray* died in May, 1870, and Mrs. *Green* died in July, 1878, in the lifetime of her husband and without having exercised her power of appointment amongst her children. She had eight children, of whom two died in infancy, and the other six were still infants, one of them, *Major Revel Rayner Green*, being the heir-at-law, and customary heir of both his parents.

*John Major Green* died on the 4th of September, 1878.

This action was instituted on the 28th of September, 1878, by the six infant children of Mr. and Mrs. *Green* in order (*inter alia*) to obtain administration of the trusts of the indenture of the 1st of March, 1870, and the ascertainment of the rights and interests of the Plaintiffs thereunder, the Defendants being the surviving trustee of that indenture and the administrator of *John Major Green*. None of the properties comprised in the indenture of the 1st of March, 1870, had been sold, and no surrender had ever been made of any of the copyhold hereditaments comprised therein in pursuance of the covenant in that behalf therein contained.

As to the moiety of the copyholds in the manor of *Braintree*, Mrs. *Green* had been admitted thereto in fee on the 2nd of April, 1866, as the only child and customary heiress of her mother, *Frances Alice Homfray*. As to the copyholds in the manor of *Badmondisfield*, Mrs. *Green* had been admitted thereto in fee on the 23rd of March, 1875, as the only child and heiress at law of

her said mother. As to the copyholds in the manor of *Giffords*, *Frances Alice Homfray*, had been admitted thereto on the 20th of July, 1853, and on her death they descended to Mrs. *Green* as her only child and customary heiress-at-law.

The surviving trustee of the indenture of settlement of the 1st of March, 1870, now presented a petition in the matter of this action, and of the *Trustee Act*, 1850, praying that the said copyhold lands and moieties thereof might vest in the Petitioner as trustee of the said indenture for all the estate therein of the Plaintiff *Major Revel Rayner Green*.

The petition was heard before the late Vice-Chancellor *Hall* on the 29th of April, 1881, when his Lordship made an order according to the prayer. From that order the infant heir-at-law and customary heir, *Major Revel Rayner Green*, now appealed by leave of the Court given in that behalf.

*Henry Fellows*, in support of the appeal :—

At the date of the settlement of the 1st of March, 1870, Mrs. *Green* was entitled at law to the copyholds generally, subject to the equitable life estate (if any) of her father, *Henry Revel Homfray*, under the deed of the 6th of September, 1869. The settlement declared no trusts of the copyholds until surrendered; no surrender was made, and after the deaths of Mr. and Mrs. *Green*, *Major Revel Rayner Green* was customary heir to both his parents.

When the vesting order now appealed from was made the infant customary heir was not separately represented, and no discussion took place. That order was in effect equivalent to an order for the specific performance of a covenant to surrender all the copyholds, so the question is whether the Court will take the legal estate out of the infant heir at the instance of the other children, and this depends upon whether such other children are volunteers or purchasers under the settlement.

Now the settlement is post-nuptial, and so the children are not within a marriage consideration. I admit, however, that any valuable consideration will take a settlement out of the statute 27 Eliz. c. 4; *Hewison* v. *Negus* (1); *Teasdale* v. *Braithwaite* (2);

(1) 16 Beav. 594. (2) 4 Ch. D. 85; 5 Ch. D. 630.

C. A. 1886 GREEN v. PATERSON.

*In re Foster and Lister* (1); *Schreiber* v. *Dinkel* (2); and that upon the authority of those cases husband and wife may contract, and can give and take sufficient consideration, for instance, by the interchange of estates, to make the contract good *inter se*. But if a husband and wife make a post-nuptial settlement the Court will not enforce it in favour of volunteers who are not parties to the contract, except in the instance of children of a former marriage: *Gale* v. *Gale* (3); *In re D'Angibau* (4); and according to the latter case a settlement for valuable consideration as between husband and wife may still be voluntary as regards collaterals. *Primâ facie*, then, these children are volunteers, and the only way in which a valuable consideration can be extended to volunteers in their position is by express bargain and contract embracing the ultimate limitations to them, and there is here no evidence of anything more than a mere voluntary desire to settle.

Again, although it has been held that a married woman may in respect of freehold estates contract as to as well as dispose of them by deed acknowledged under the *Fines and Recoveries Act*, 3 & 4 Will. 4, c. 74, *Crofts* v. *Middleton* (5), that Act does not extend to copyholds of which a married woman is seised at law (sect. 77), nor does it empower her either to contract as to or to dispose of copyholds. Therefore Mrs. *Green's* covenant was void as to the copyholds of which she was seised at law, although the deed was acknowledged, because the Act did not apply, and because as a *feme coverte* she had no contracting power outside it.

The general result is that the other children are mere volunteers, and that the order appealed from was wrong.

*George Williamson*, for the trustee of the settlement of the 1st of March, 1870, in support of the order:—

As to the *Braintree* copyholds, at the date of the settlement, Mrs. *Green* being tenant on the Court rolls in fee, was a trustee for her father during his life, and subject thereto for the appointees under the disentailing assurance of the 28th of February, 1870, which deed passed the entire equitable interest in the

(1) 6 Ch. D. 87.
(2) 54 L. J. (Ch.) 241.
(3) 6 Ch. D. 144.
(4) 15 Ch. D. 228.
(5) 8 D. M. & G. 192, 212, 219.

copyholds to the trustees, and was consequently complete in equity: *Kekewich* v. *Manning* (1); *Ellison* v. *Ellison* (2). Accordingly at the time the vesting order was made the infant customary heir, to whom the legal estate had descended on the death of his mother, was a trustee for the persons interested under the settlement of the 1st of March, 1870, and the order vesting the legal estate in the trustee of that settlement was rightly made.

As to the other copyholds, although Mrs. *Green* was entitled thereto absolutely both at law and in equity, she had by the deed of the 6th of September, 1869, constituted herself a trustee for her father for life, and subject thereto for herself in fee, and accordingly the same argument applies.

Again, the settlement of the 1st of March, 1870, although post-nuptial, was not a voluntary settlement, because consideration passed between the husband and the wife. For the husband gave up the present right to the rents of the copyholds derived from his marital title, and his estate by the curtesy, and got in exchange the ultimate fee for his children, whilst the wife obtained the first life interest for her separate use. There is, therefore, sufficient consideration to support the settlement in favour of the younger children. [He also referred to *Gilbert* v. *Overton* (3), and *Atkinson* v. *Smith* (4).]

*Nalder*, for the Plaintiffs other than the customary heir.

*Fellows*, in reply:—

The disentailing assurance was not entered upon the Court rolls within six months after execution, as required by the *Fines and Recoveries Act*, 3 & 4 Will. 4, c. 74 (sects. 40, 41, 47, 50 and 53), with regard to equitable estates tail in copyholds: *Honywood* v. *Foster* (5); *Gibbons* v. *Snape* (6). It was therefore void, and the power of appointment it purported to create could not be exercised. And so the deed of the 1st of March, 1870, was neither an exercise of a valid power of appointment, nor a disposition within the statute, and it amounted to nothing but a

(1) 1 D. M. & G. 176, 188.
(2) 6 Ves. 656.
(3) 2 H. & M. 110.
(4) 3 De G. & J. 186.
(5) 30 Beav. 1.
(6) 1 D. J. & S. 621.

C. A. 1886

GREEN v. PATERSON.

covenant which could not in any way constitute Mrs. *Green* a trustee for her father and children.

[The case of *Price* v. *Jenkins* (1) was also referred to in the course of the arguments.]

COTTON, L.J.:—

The subject-matter of this appeal does not seem to have been considered by Vice-Chancellor *Hall*, and at the time he made the order he did not in reality give any opinion upon the questions which are now brought before us. [His Lordship then referred to the facts of the case and continued:—] The settlement of the 1st of March, 1870, being executed and acknowledged as required by the Act 3 & 4 Will. 4, c. 74, is unquestionably operative as regards the freeholds, but it deals also with the copyholds. As to the *Braintree* copyholds, it purports to exercise a joint power of appointment which was considered to be vested in the husband and wife, and as to the other copyholds there is a covenant to surrender in the usual form. Now all these copyholds had come to Mrs. *Green* through her mother Mrs. *Homfray*, and as to the *Braintree* copyholds, Mrs. *Green* had an estate tail therein. This estate tail she purported to bar by the deed of the 28th of February, 1870, which reserved to her and her husband a power of appointment, and gave her in default of its exercise an estate in fee.

It was that joint power of appointment which was purported to be exercised by the deed of the 1st of March, 1870. But in fact that power of appointment was not well given, because although the deed was acknowledged by Mrs. *Green*, yet being a deed intended to bar her estate tail in the copyholds, it was necessary that it should be entered on the Court rolls of the manor within six months. That was decided by the Court of Appeal, affirming the previous decision of Lord *Langdale* in *Honywood* v. *Foster* (2). We must take that to be the law, and it seems to me to be the true construction of the statute. That deed, therefore, not being entered on the Court rolls was inoperative, and we cannot consider that there was any power of appointment which Mr. and Mrs. *Green* could exercise.

(1) 4 Ch. D. 483; 5 Ch. D. 619. (2) 30 Beav. 1.

Coming, then, to the other copyholds, the contention put before us is that Mrs. *Green* must be considered either as having been admitted, or as having a right to be admitted, tenant on the rolls as trustee; and, therefore, that the covenant to surrender must be treated as an effectual declaration of her intention with reference to the trust estate which was so vested in her, and so that she as trustee held this property upon trust for the parties interested under the settlement. In other words that the covenant must be treated either as an assignment of her equitable interest, or as a good declaration of trust by her. Now, in my opinion, one must upon this point consider several matters; first of all, does the deed purport in any way to declare Mrs. *Green* to be a trustee for the parties interested under the settlement? Is there any intention shewn that she shall hold it as trustee for them? In my opinion the intention expressed here is quite the contrary. There is a covenant in the ordinary form that Mrs. *Green* will surrender the copyholds to the trustees of the settlement. That is inconsistent with any idea of her intention to constitute herself a trustee for these parties. The intention shewn is to transfer, but unfortunately for those claiming under the settlement she did not do what she covenanted to do, *i.e.*, surrender the property so as to vest it in the trustees, which is the effect of the deed.

Then it is said that if she is already a trustee, that would be a sufficient indication of the intention to assign the existing equitable estate. In my opinion that will not hold, for this reason, that there was nothing to constitute her a trustee. In 1869 a deed was executed by the parties in which it was contracted that the father of Mrs. *Green* should have an estate during his life. How it was intended that that should operate I know not, but though the deed, being made under the sanction of the Court in order to compromise the suit, would bind Mrs. *Green*, it would not be in any way effectual as regards the copyholds, because it was in no way a deed executed so as to bind her even as regards freeholds under the Act. Looking, then, at the operation of the Act with reference to copyholds, we find that, having up to sect. 77 dealt with the general method of barring estates tail, an enactment is introduced in sect. 77 for the purpose, in the first

C. A. 1886 GREEN v. PATERSON. Cotton, L.J.

place, of enabling married women, except tenants in tail, to dispose of lands of any tenure with the concurrence of their husbands by acknowledged deed, and then follows this proviso, "Provided always, that this Act shall not extend to lands held by copy of Court roll of or to which a married woman, or she and her husband in her right, may be seised or entitled for an estate at law" (that was the case here), "in any case in which any of the objects to be effected by this clause could before the passing of this Act have been effected by her, in concurrence with her husband, by surrender into the hands of the lord of the manor of which the lands may be parcel." All this property, therefore, is within the exception contained in this proviso. Although it is very true that there was an arrangement between the parties in 1869 that Mrs. *Green* should be admitted without regard to the rights of her father, and without regard to the provision which had been made for raising the sums for costs, yet the surrender might have been made by her, and to effectuate some of the objects which were intended. That being so, in my opinion the Act does not apply. But independently of that, the transaction of 1869 was not so carried out as to enable recourse to be had to the powers of the Act, even if they were applicable to the present case.

Now we come to the last question: can it be said that this is otherwise than a voluntary settlement? Cases were referred to under the statute 27 Eliz. c. 4, where there had been an exchange of interests between husband and wife, and it has been said that a deed supported by such a consideration was not fraudulent under the statute. In the case of *Price* v. *Jenkins* (1) Lord Justice *James*, who was then a member of the Court of Appeal, held with the concurrence of the rest of the Court that an assignment of leaseholds where the assignee became liable for rents was not fraudulent under the Statute of *Elizabeth* as against the subsequent purchaser. There was a later case, *In re Ridler* (2), where the Court of Appeal held that that would not apply to the statute of 13 Eliz. with reference to creditors; and that being so, it is simply this, that where there is anything passing between the parties, as there might be said to be here between husband and wife, or as there may be said to be in an assignment of lease-

(1) 4 Ch. D. 483; 5 Ch. D. 619. (2) 22 Ch. D. 74.

holds, the deed is not under the statute in favour of purchasers fraudulent; but still it is voluntary so as to be bad as against creditors, and I think in *In re Ridler* (1), which was before Lord *Selborne*, the Master of the Rolls, and myself, it was put on this ground, that even in the same sort of circumstances as existed in *Price* v. *Jenkins* (2), or in a case like this, where a man has assigned all his property, leaving nothing to pay his creditors, the natural consequence is to deprive the creditors of their remedy, and therefore it must be considered that that is the effect of the deed, and the deed must be considered under the statute as bad.

Now we have to consider a question which, as far as I know, has not yet been decided, *i.e.*, whether, when there has been in a settlement a giving up by the husband of an estate which he had in his wife's property, the deed is to be considered as not a voluntary deed but as a deed for valuable consideration, not as between the husband and wife, but as in favour of the children, and not the children of an intended marriage but of a marriage which has already taken place, and any future children of the lady. Now, in my opinion, such a settlement must be considered as voluntary. And in this case it must, in my opinion, be considered that the younger children are seeking to enforce a settlement which, as regards them, must be treated as voluntary, and that it cannot be treated as one which the Court will enforce so as to vest in the trustees of it the legal estate which the heir-at-law here is claiming, and originally had vested in him. It is scarcely necessary to refer to the well-known rule that although a voluntary settlement, if perfected, will be enforced by the Court, yet if it is not perfected, and there is anything to be done in order to give effect to it, the Court will not interfere, although it will do so in all cases where the settlement is one which the parties claiming execution of it can say is for valuable consideration as regards them.

In my opinion, therefore, this appeal must succeed, and the order must be discharged. I have a little doubt as to what would be the proper order, because probably the discharging of that order will put an end to everything which has been done

(1) 22 Ch. D. 74. (2) 4 Ch. D. 483; 5 Ch. D. 619.

C. A. 1886 GREEN v. PATERSON.

under it, but really the Court, by that order, purported to vest these copyholds in the trustee, and I think that the eldest son, if he desires it, is entitled to have a surrender in his favour by the trustee.

BOWEN, L.J.:—

I have come to the same conclusion, and for the same reason as the Lord Justice has assigned, and I shall leave anything which may be further said on the case to my learned Brother Lord Justice *Fry*, with one exception as to a point which arose during the case with reference to the necessity of entering the disentailing assurance on the roll of the manor within six months. If one took the section which prescribes the entry on the roll of the manor alone, it certainly would look as if the obligation to enter was a directory obligation only, but the matter is cleared up when you look at the other sections of the Act. When you read sect. 41 with sect. 50 and sect. 53, you will see that the provisions for enrolment in the Court of Chancery within six months become applicable to copyhold estates, and this involves entry on the manor books within six months. It is, therefore, clear that the case of *Gibbons* v. *Snape* (1) is rightly decided on the construction of the Act, and even if it were not, of course we are bound by it.

FRY, L.J.:—

I have come to the same conclusion as my learned Brethren. It appears to me that the petition in this case is to be treated as an action by the children to enforce the covenant to settle contained in the post-nuptial settlement of 1870. Those children were not parties to that contract, and, *primâ facie*, no person who is a stranger to a contract can sue to enforce it. But upon that general rule there is, as is well known, this exception grafted, that children born of the marriage in contemplation of which a settlement has been executed, are treated to a certain extent as if they were parties, and they are allowed to sue for the execution of that settlement. It appears to me that in the case of a post-nuptial settlement that rule cannot apply. The

(1) 1 D. J. & S. 621.

consideration of marriage is not infused into that settlement. It is made for considerations which arise after the marriage, and, therefore, in point of principle, I am unable to see how the exception which applies to an ante-nuptial settlement, giving children of the marriage a right to sue for the performance of those covenants, can apply to post-nuptial settlements.

Now that point, it so happens, came for decision before the Irish Master of the Rolls in 1860 in a case of *Joyce* v. *Hutton* (1). Under the marriage settlement there the husband and wife both took interests, and by a post-nuptial settlement they both covenanted to assign their life interests for the benefit of the children. The children sued for the performance of the contract, and the Master of the Rolls dismissed their petition. In the course of his judgment he made these observations: "It is also established by authority that, as a general rule, where two persons, for valuable consideration, as between themselves, covenant to do an act for the benefit of a third person, that third person cannot enforce the covenant against the two, although either of the two might, as against the other . . . No doubt, as stated by Lord *Cottenham* in *Hill* v. *Gomme* (2), 'in all marriage contracts (that is, in contracts in consideration of marriage), the children of the marriage are not only objects of it, but *quasi* parties to it.' But I apprehend that observation is not applicable to post-nuptial deeds or contracts. There is no marriage consideration in such case; and I do not understand on what ground the petitioners, as children of the marriage, and who are not within the consideration (if any) of the post-nuptial settlement, and who are not parties to the contract, can enforce it." That view appears to me to be conclusive of the case of the Petitioner in this case as regards the marriage contract, subject to one exception, which I shall refer to in a moment. I have hitherto treated the contract as if it were one for valuable consideration, and I am bound to say that in my judgment, as at present advised, it was one for valuable consideration. I do not think the cases upon the Statute of *Elizabeth* are material to shew whether there was consideration or not, because we all know there may be a fraudulent settlement, although there is consideration.

(1) 11 Ir. Ch. Rep. 123, 130. (2) 5 My. & Cr. 250, 254.

C. A. 1886 GREEN v. PATERSON. Fry, L.J.

No doubt the absence of consideration is a badge of fraud, but it is not conclusive. The cases of marriage settlements made to defeat the interests of creditors, which have been set aside in spite of the marriage consideration, are very strong illustrations to shew that a settlement may be fraudulent although not voluntary. It appears to me, therefore, immaterial in determining this case whether there was consideration or not. I think there was consideration between the husband and wife; but it appears to me that, although there was that consideration between husband and wife, the children must be treated as strangers to the contract, and as such are unable to sue.

That appears to me to conclude the whole of the case, with the exception of the other point which arises on the *Braintree* copyholds. In that case, it was contended that there was a valid power of appointment created by the deed of the 28th of February, 1870, and that that was executed by the deed of the 1st of March, 1870, which is the instrument in question. Now, it appears to me, that the deed of the 28th of February, 1870, was inoperative as an assurance to bar the estate tail in the copyhold in which Mrs. *Green* was interested. In the first place, the statute requires that the instrument to bar the estate tail shall be a disposition, and I find in this case nothing like a disposition. It is a mere declaration of trust by the lady. In the second place, it appears to me that under the statute it was obligatory that that instrument should be entered on the rolls of the manor within six months, and nothing of the sort was done. I think, therefore, that there was no valid power of appointment, and that the exercise of that invalid power by the deed of the 1st of March, 1870, would confer no better title on the Petitioner.

It appears to me, therefore, that this appeal must be allowed.

Solicitors: *Collyer-Bristow, Withers, Russell, & Hill.*

W. W. K.

## *In re* LYNDON'S TRADE-MARK.

C. A.
1885
PEARSON, J.
*July* 16.
C. A.
1886
*Feb.* 22, 25.

[1885 L. 256.]

*Trade-mark—Registration—Similarity—Old Mark applied to New Class of Goods—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 64, 65, 72.

*L.* had used from 1864, in respect of goods included in class 13, a trade-mark consisting of the head of *Minerva*, down to and including the shoulders, the head bearing a helmet with ringlets hanging down behind. In 1884, being about to extend his business to class 12, he applied to register for that class the same head with the word "*Athena*" under it. This application was opposed by *B.*, who had used from 1869 a cutler's mark consisting of a head with the word "*way*" under it. The head had a sort of wig upon it, with small curls behind, and included the neck and part of the shoulders. In 1884 *B.* registered this mark under the Act of 1883 as an old cutler's mark, but the design actually registered departed from the old mark which he used, the head on the register being an uncovered head with a few sparse hairs upon it, and taking in only a small portion of the neck and no part of the shoulders :—

*Held*, by *Pearson*, J., on the authority of *In re Worthington & Co.'s Trade-mark* (1), that *L.'s* mark so resembled that of *B.* as to be calculated to deceive, and that it could not be registered.

*Held*, by the Court of Appeal, that the question whether a new mark is so like another as to be calculated to deceive is to be decided by considering whether the new mark is so like the other that when both are fairly used one is likely to be mistaken for the other, regard being had to size, the material on which the mark is to be impressed, the effects of wear and tear, and other surrounding circumstances; that *L.'s* mark was to be compared with the mark *B.* had put on the register, not with the mark which he had used; and that *B.*, whose evidence was directed to a comparison between *L.'s* mark and the mark which *B.* had used, which was much more like *L.'s* mark than *B.'s* registered mark was, had not made out that the new mark was calculated to deceive.

THIS was an application for the registration of a trade-mark.

The applicant was Mr. *G. F. Lyndon*, of the *Minerva Works*, *Birmingham*, a spade, shovel, and edge-tool manufacturer. He had carried on the business there for nine years, in succession to his father, Mr. *W. A. Lyndon*, to whom the business formerly belonged. In the year 1864 the father adopted the head of *Minerva* as a trade-mark for spades, shovels, and edge tools for

(1) 14 Ch. D. 8.

C. A. 1886 — *In re* LYNDON'S TRADE-MARK.

agricultural purposes, manufactured by him. The head had a helmet and curls behind, and included the neck and shoulders and part of the bust. He continued to use this mark for these goods as long as he carried on the business, and his son (the present applicant) afterwards continued to use the same mark for the same goods. On the 28th of August, 1884, the son applied for the registration of this mark (No. 39,256) for "spades and shovels made of steel or partly of iron and steel," being articles included in class 13 under the Trade-marks Rules, and he described the mark as having been used by himself and his predecessors in business ten years before the 13th of August, 1875. On the 4th of December, 1884, he obtained a certificate of the registration of the mark accordingly.

On the 30th of September, 1884, the son applied for the registration of a mark consisting of the same head of *Minerva*, with the word "*Athena*" printed or stamped below it, as a trade-mark (No. 39,939) for "all articles of cutlery and edge tools included in class 12," and also as a trade-mark (No. 39,940) for "spades shovels, hoes, and agricultural forks, made of steel, or partly of iron and steel," these being articles included in class 13. In both cases the mark was described as a new one (*i.e.*, not used prior to the 13th of August, 1875).

The application was opposed by *John Bedford & Sons*, who were merchants and manufacturers of cutlery, edge tools, saws, files, and the like goods, being articles comprised in class 12. They and their predecessors in business had for fifteen years and upwards been in the habit of placing on their goods a mark consisting of the head of a man with the word "*way*" underneath it, commonly known as the "headway" mark. This mark was in December, 1869, granted by the *Cutlers Company* at *Sheffield* to the predecessors in business of *Bedford & Sons*, and as used by them the head had a sort of wig upon it, with a line of definition between the head-gear and the face, with small curls behind, and included the neck, the shoulders, and part of the bust. On the 9th of April, 1884, the mark was, under the provisions of sect. 81 of the *Patents, Designs, and Trade Marks Act*, 1883, registered in the new *Sheffield* register as an old *Cutlers Company's* mark in respect of (so far as regarded class 12) cutlery, edge tools, files,

saws, and the like goods. The mark so registered differed from that which they used in these particulars—that the head registered was a bare head with a few sparse hairs upon it and no line of definition between the head and face, and it took in only a small part of the neck, and no part of the bust or shoulders.

Very strong evidence was given by cutlers at *Sheffield* that *Lyndon's* mark was likely to be mistaken for *Bedford's* mark, but the evidence was pointed entirely to the similarity between *Lyndon's* mark and the mark used by *Bedford & Sons*.

*Bedford & Sons* opposed the present application, on the ground that the mark which *Lyndon* proposed to register so closely resembled the "headway" mark as to be calculated to deceive. The opposition extended in the first instance to the registration in respect of goods in either class 12 or class 13; but ultimately, on the 4th of April, 1885, the opposition as regarded class 13 was withdrawn.

The application was heard before Mr. Justice *Pearson* on the 16th of July, 1885.

*Aston*, Q.C., and *Macrory*, for *Lyndon*:—

There is no such similarity between *Lyndon's* mark and *Bedford's* as to be calculated to deceive. *Bedford* claims in effect to prevent the whole trade from using any head at all as a trade-mark in connection with goods in class 12.

*Hatfield Green* (*Cozens-Hardy*, Q.C., with him), for *Bedford & Sons*:—

The essential thing in the mark is, that it is a human head. An intending purchaser would not be likely to remember whether the head had on it a helmet.

[PEARSON, J.:—You are claiming a monopoly of heads. If a man has acquired by user a right to a trade-mark for one class of goods, is he not entitled, if he extends his business to another class, to use the mark for that class also?]

The rules as to old marks (*i.e.*, marks used before the passing of the Act of 1875) and new marks are very different. In the case of an old mark the person who uses it is entitled to registration, unless more than three persons have used that mark or

C. A. 1886 *In re* LYNDON'S TRADE-MARK.

similar marks. A new mark cannot be registered if it is so like another registered mark as to be calculated to deceive: sect. 72. And, when a mark has been used for one class of goods only, an application to register it in connection with another class must be treated as an application to register a new mark. This is the effect of the decision of the Court of Appeal in *In re Rosing's Application* (1). That case also shews that *Lyndon's* mark is so like *Bedford's* as to be calculated to deceive.

[PEARSON, J.:—On the point of similarity *In re Worthington & Co.'s Trade-mark* (2) seems to be a still stronger authority in your favour, though Lord Justice *Cotton* differed from the other Judges.]

I rely on that decision. In the present case the stamping of the marks is likely to become blurred in the course of time, and then it would be very difficult to distinguish one head from the other. Moreover, on small tools, like pocket knives, the mark will necessarily be very small, one head looking very like another. In knives the mark is always stamped on the "tang," *i.e.*, the part between the sharp part of the blade and the handle, and, when the stamping is done hurriedly, part of the die might be outside the edge and thus the helmet might disappear altogether.

*Aston*, in reply:—

[PEARSON, J.:—I do not see how to get over the decision in *In re Worthington & Co.'s Trade-mark*. I think the difference between the two marks was infinitely greater there.]

The salient feature there was a triangle—the outline. There was no composite character in the mark as there is here, and the combinations are different. In the one case it is a head with the word "*way*;" in the other, a head with the word "*Athena*." There is also the distinction of the helmet. There is no probability of deception.

PEARSON, J.—

It is certainly a curious result of the *Trade Marks Act*, and one which I do not think could have been contemplated by the

(1) 54 L. J. (Ch.) 975. (2) 14 Ch. D. 8.

framers of it, that, because Messrs. *Bedford* have registered as their trade-mark for goods in class 12 a head with the word "*way*" under it, Mr. *Lyndon* is prevented from doing that in the course of his business which, apart from the Act, he might undoubtedly have done, and would have done with perfect honesty, viz., use on the smaller articles, to which he is honestly extending his business, the trade-mark which for ten years before 1875 he had used for larger articles, and which had become known as his trade-mark. However, the present Act says that two persons shall not register two trade-marks so similar as to be calculated to deceive, and I have simply to consider whether these trade-marks are so similar that they ought not both to be on the register. I do not think I can have any regard to the fact that Mr. *Lyndon* has used the head of *Minerva* as his trade-mark for goods in class 13 for now more than twenty years. I think the proper construction of this Act is, that each of the classes of goods is to be treated as separate and distinct, and the registration of a mark in respect of each class is to be taken as a separate registration, and that, when any person applies to register a trade-mark in one class, it is not enough for him to say that he has used that mark for another class. He may be prevented from using the mark for the second class, if any other person has used the same or a sufficiently similar mark for that class.

Then the only remaining question is, are these two devices so similar that they ought not both to be on the register at the same time? In *In re Rosing's Application* (1) the two marks were to my mind less similar than the present marks are. I think the proper way of trying the question is to look at the marks as they would appear when properly used in the trade to which they are assigned, and to consider whether they are so alike that purchasers might be deceived. In the absence of prior decision I should have felt very grave doubts whether these two trade-marks are so alike, that Messrs. *Bedford*, by registering as their mark a head with the word "*way*" under it, can prevent another person from registering for goods in the same class a head with a helmet upon it, and with the word "*Athena*" underneath it.

But it seems to me that the decisions of the Court of Appeal

(1) 54 L. J. (Ch.) 975.

C. A. 1886 *In re* LYNDON'S TRADE-MARK. Pearson, J.

bind me. I am bound to follow those decisions simply because they are decisions of a superior Court, and I am not the less bound to follow the decision in *In re Worthington & Co.'s Trade-mark* (1) because there one of the learned Judges differed from his colleagues.

To my mind the two trade-marks in question in that case were so entirely different, that, had the case come before me in the first instance, I should have agreed with the view of Lord Justice *Cotton*, and should have held that the marks were not so similar as to be calculated to deceive. In that case Messrs. *Bass & Co.*, whose trade-mark, a red triangle with the words "*Bass & Co.*" underneath it, is so well known, sought to restrain Messrs. *Worthington*, who were also brewers, from registering a device consisting of a triangle with a church in the centre of it, and round the triangle, written in plain and large letters, "*Beccles Brewery*, Established 1830." Looking at those two marks, I should have said that no purchaser of any intelligence could by any possibility fall into the error of thinking they were the same. Nevertheless the Court of Appeal, affirming the judgment of *Jessel*, M.R., held that the marks were so similar that purchasers might be deceived. *James*, L.J., took that view, and Lord Justice *Brett* said (2): "If these two trade-marks were kept as printed in the advertisement, I should come to the conclusion that they present so different an appearance that the second one could not be calculated to deceive, for that no one could mistake it for the first. But it seems to me that, if they were not used in black and white, but the ground of each triangle was of the same colour, the second mark would be calculated to deceive. Supposing them both to be red, even as at first presented and when quite fresh, I think they might be mistaken for each other by an ordinary observer; but certainly, if the design of the second one were to be at all worn, I should say that they would present nearly the same appearance. It would not be so only in red; it would be so if they were blue, yellow, or green, or in any colour but black and white, as presented on the advertisement. In my opinion, these two marks are so much alike, although not identical, that the second one is calculated to deceive." Lord Justice *Cotton* took a different view. He thought that the two marks ought to be

(1) 14 Ch. D. 8. (2) 14 Ch. D. 16.

looked at as they would appear if fairly and properly printed, as they were printed and presented to the Court, under which circumstances he thought it was impossible to say that they were so similar that any person could be deceived. Nevertheless, the Court decided that they were so similar that purchasers would probably be deceived. In the present case I cannot help saying, if I am to adopt the language of Lord Justice *Brett*, that, if Mr. *Lyndon's* design was at all worn, it might well present an appearance very like that of Messrs. *Bedford*. It is my bounden duty to follow the decision of the Court of Appeal, and I must, therefore, decide that Mr. *Lyndon* cannot register his mark for class 12.

C. A. 1886 *In re* LYNDON'S TRADE-MARK. Pearson, J.

With regard to the costs, the opposition to the registration for class 13 was not withdrawn until after the summons had been adjourned into Court. That being so, the applicant must pay the costs as regards class 12, and the opponents must pay the costs as regards class 13, up to the date of their letter withdrawing their opposition. There will be a set-off of the costs.

W. L. C.

The applicant appealed. The appeal was heard on the 22nd of February, 1886. C. A.

*Aston*, Q.C., and *Macrory*, for the Appellant:—

Looking at the case apart from *In re Worthington & Co.'s Trade-mark* (1), the question is merely one of fact, are the two marks so much alike as to be likely to be mistaken for each other? *In re Worthington & Co.'s Trade-mark* went on the ground that if the two marks were printed in the same colour they might readily be confused, and the triangle moreover had been so long associated with the name of *Bass* that confusion was particularly likely to take place. That case lays down no rule of law but this, that you must not look only at the marks as they appear on the register, but as they will appear in actual use, and *In re Rosing's Application* (2) lays down no different rule. If the word "*Athena*" was blurred, it would leave a head not at all similar to the head on *Bedford & Sons'* mark, and if that were not so, still

(1) 14 Ch. D. 8. (2) 54 L. J. (Ch.) 975.

C. A. 1886 *In re* LYNDON'S TRADE-MARK.

the Court would hardly lay down the rule that if a trade-mark is liable to be confused with another when a part of it is left out, it must not be registered.

*Cozens-Hardy*, Q.C., and *Hatfield Green*, for *Bedford & Sons*:—

If the two marks are looked at on paper they are easily distinguishable, but according to *In re Worthington & Co.'s Trade-mark* (1) and *In re Rosing's Application* (2) they must be looked at as used, and when applied to cutlery few persons will distinguish them. The detached words will often not be apparent—in small articles there often would not be room to put them in, and if they are left out, the marks when on a small scale, which they generally are on fine cutlery, would be almost undistinguishable.

*Aston*, in reply.

1886. Feb. 25. COTTON, L.J.:—

This is an appeal from the refusal of Mr. Justice *Pearson* to order the registration of a trade-mark which Mr. *Lyndon*, the Appellant, sought to register. The registration was opposed by Messrs. *Bedford* on the ground that the trade-mark was calculated to deceive as being like the trade-mark which Messrs. *Bedford* have on the register.

The trade-mark which the Appellant sought to register was a head of *Minerva* with the word "*Athena*" under it, and was intended to apply to a class of goods consisting of fine cutlery. The head had a helmet, and long ringlets hanging down behind. The Appellant applied to register it for classes 12 and 13. No. 12 consists of articles of cutlery and edged tools—and 13 is a class consisting of spades, shovels, and similar articles, but as regards this latter class the opposition was withdrawn.

The Messrs. *Bedford* had previously registered in *Sheffield* a trade-mark consisting of a head with short bristly hair with the word "*way*" under it, and we are told that their goods had got the name of "headway" goods. The head according to their registered design is a head with a small portion of the neck, but not shewing any part of the bust or even the shoulders, whereas

(1) 14 Ch. D. 8. (2) 54 L. J. (Ch.) 975.

the *Minerva* head shews the shoulders and part of the bust, and is very different from that which shews only a small part of the neck and no part of the shoulders. I may mention, though it is not really very pertinent to the present question, that *Athena's* head without any word under it had been used and registered before by *Lyndon*, but the mark now before us was new from having this word "*Athena*" under it. What we have to consider is, whether this mark so nearly resembles the trade-mark of Messrs. *Bedford* already on the register as to be calculated to deceive. I quite agree that we are bound not to look only to the figure on the register, but to consider what it will be like when used in the way in which it has to be used. In my opinion (and I think that the opinion of the present Master of the Rolls in *In re Worthington & Co.'s Trade-mark* (1) was the same, though we came to different results), the question is, if what you propose to register is fairly used will it be calculated to deceive? It was said part of it may be left out, and part of the opponents' mark may be left out, and then they will be very much alike, but I am of opinion that if the opponents leave out an essential part of their trade-mark, what they use will not be their trade-mark. It is quite true that if a stranger uses the essential part of a registered trade-mark he will be restrained from such user, though he is not using the whole, because what he is doing is calculated to pass off his goods as the goods of the owner of the mark, and as I said before in *In re Edwards' Trade-mark* (2), I think it was the general object of the *Trade Marks Act* not to give new rights, but to regulate the use of, and the means of protecting, trade-marks.

I will say here, that we may not be supposed to have decided or overlooked the point, that I do not give any opinion how far the Act enables a person to register as a trade-mark that which he has not used as a trade-mark. It may be that the simultaneous use and registration would be sufficient, or it may be that parties may register what they are not using, that is a question which may have to be decided some day, but we need not decide it now, for Mr. *Lyndon* has used the *Minerva* head though without the word "*Athena*" under it.

Now as regards the cases: in *In re Worthington & Co.'s Trade-*

(1) 14 Ch. D. 8. (2) 30 Ch. D. 454, 470.

C. A. 1886 *In re* LYNDON'S TRADE-MARK. Cotton, L.J.

*mark* (1) it was a paper label, and the learned Judges relied much upon this, that colour was not defined in the registration, that Messrs. *Bass* used a red triangle, and that the applicants might colour their triangle red and thereby hide the church which was the main point of difference between the two marks, and so make their mark look like that of Messrs. *Bass*. But in this case there is no colour in the mark, it is to be stamped on steel. It is true that another difficulty then arises, because we must regard what would be the consequences of fair user, and it is obvious that when goods are stamped the stamping may sometimes be a little imperfect and not actually shew what the trade-mark is. But in my opinion if this mark be used fairly, there is not any probability that it will be calculated to deceive, subject to this, that where marks are made very small it is undoubtedly very difficult to distinguish one mark from another. In my opinion, however, it would not be right to say that because a mark may be made so infinitesimally small that you cannot distinguish it from one already on the register, therefore it must not be registered.

I at first felt a difficulty in consequence of the evidence given on behalf of the Respondents by the experienced *Sheffield* cutlers who say that *Lyndon's* mark is so like that of Messrs. *Bedford* as to be calculated to deceive, and would not be allowed to be registered on the *Hallamshire* register. But when we look at what they were considering, we find that they were not comparing the mark proposed to be registered with the mark on the register, but were comparing the marks actually used. Now the head which is represented on *Bedford & Sons'* knives, which were made exhibits, is a head with shoulders and with an entirely different head of hair from that which appears in their trade-mark already on the register, and their mark on the register is what we have to consider.

I therefore come to the conclusion that the trade-mark proposed to be registered is not so like the registered trade-mark as to require us to say that it is calculated to deceive. In my opinion, therefore, *Lyndon* is entitled to have his mark entered on the register, but of course that does not lead to the conclusion that if he uses it in such a way as to imitate Messrs. *Bedford &*

(1) 14 Ch. D. 8.

*Sons*' mark he will derive any protection from his registration. This mark, in my opinion, if fairly used, will not be calculated to deceive, when compared with the registered trade-mark of Messrs. *Bedford* as fairly used. But if parties try to pass off their goods as those of others we know how the Court of Chancery deals with them.

BOWEN, L.J.:—

I do not think that this is an easy case, but the law which we have to apply appears to me to be fairly without dispute. The question which we have to decide is, whether the Comptroller is right in refusing to register the applicants' trade-mark, on the ground that it so nearly resembles a trade-mark already on the register with respect to goods of that class as to be calculated to deceive. Mr. Justice *Pearson* has thought that in this instance the trade-mark which it was proposed to register did so nearly resemble the trade-mark already on the register as to be calculated to produce deception. Now it seems to me that the words "calculated to deceive" have already received a judicial interpretation in *In re Worthington & Co.'s Trade-mark* (1), and *In re Rosing's Application* (2). It seems to me that a trade-mark is calculated, by its resemblance to another already on the register, to deceive, if in the course of its legitimate use in the trade it is likely to do so. In considering the question whether this result is probable, it seems to me that we must look at the circumstances of the case. We must consider whether blurring is likely to take place; we must consider, in the case of a stamp, whether, having regard to the special class of articles on which the impression is to be made, there is likely to be such indistinctness as is calculated to deceive. It seems to me that in many cases we may be obliged to regard the size of the article upon which the mark is intended to be made or fixed, and the material or the groundwork, so to speak, upon which it is to be placed. I think it would not be wrong to consider the probability, if an impression had to be made on a hard substance, of some letters being more likely to take with distinctness than others, or parts of the design being likely to come out with more perfection, while other parts

(1) 14 Ch. D. 8. (2) 54 L. J. (Ch.) 975.

C. A. 1886 *In re* LYNDON'S TRADE-MARK. Bowen, L.J.

would remain more imperfectly represented. We ought also to have regard to the effect likely to be produced in the particular article by wear and tear. All these seem to be things which a man of common sense and business habits would take into account if he were asking himself the question whether one trade-mark is so like another as to be calculated, in the probable course of its use in trade, to deceive. I think that the law was laid down in conformity with this view both in *In re Worthington & Co.'s Trade-mark* (1) and in *In re Rosing's Application* (2).

Applying that view to the matter before us, what is the proper standard of comparison? We must compare the trade-mark which it is desired to register, with the trade-mark already on the register, as registered, although, as I have said, we are not confined to the paper registration, but must see how the proposed mark will probably in the legitimate user of it shew itself on the article upon which it is to be impressed. Now I am not by any means sure that there is not some possibility of confusion taking place between these two marks, but I do not feel that we are justified in arriving at the conclusion that there is such similarity as is calculated to deceive. When I first read the affidavits of the *Sheffield* cutlers they impressed me very much. Two men at the head of the cutlery trade gave it as their distinct opinion that customers were likely to be deceived. But on examining their affidavits it seems to me to be clear that what they have really been comparing is, the trade-mark which it is proposed to register, and the mark previously used by *Bedford & Sons* as stamped upon the exhibits. They have not taken a true standard of comparison, they have not been comparing the trade-mark which is sought to be placed on the register, with the trade-mark already on the register, but with a mark which differs from the latter by approximating much more to *Lyndon's* proposed trade-mark than does the trade-mark already on the register. These two experienced gentlemen, therefore, have not been comparing the things which we have to compare, but they have been making a comparison which is more to the disadvantage of the applicant than if they had taken the right standard of comparison. I do not think, therefore, we can attach

(1) 14 Ch. D. 8. (2) 54 L. J. (Ch.) 975.

much weight to their evidence. It seems to me that a mistake has been made in the registration of the "Headway." Instead of copying the actual mark impressed upon the articles and in use upon the articles, the draughtsman has taken a head which differs very substantially from it. The head impressed upon the "Headway" articles has a sort of wig and an attempt at a shoulder, but in the head upon the register the wig disappears, a few sparse hairs are left, and the shoulders are altogether taken away. Applying the best judgment I can to the materials before us, I am of opinion that we cannot justly come to the conclusion that Messrs. *Bedford & Sons* are entitled to object to the mark which is now sought to be registered.

FRY, L.J.:—

If I were not differing from the judgment of the Court below, I should probably content myself with saying that I concur in the judgments of my learned Brethren, and that Lord Justice *Bowen* has expressed exactly the view I take in this case. I think the burthen of proof that there is the similarity alleged, rests on Messrs. *Bedford* who object to the registration, and I think that under the peculiar circumstances of this case, and the difference between their registered trade-mark and the trade-mark appearing on the exhibits, they have failed to discharge that burthen.

The words of the section in question (sect. 72, sub-sect. 2) are: "The Comptroller shall not register with respect to the same goods or description of goods a trade-mark so nearly resembling a trade-mark already on the register with respect to such goods or description of goods as to be calculated to deceive." Those words "calculated to deceive" import at first sight a design to deceive, but I think it plain, both from the rest of the section and the decisions of the Courts, that a mark is within the section calculated to deceive when that mark, fairly used, is so like a mark on the register, also fairly used, as that the one is likely to be mistaken for the other.

In the present case, I think it is our bounden duty to look at all the circumstances, and I should, for myself, be perfectly prepared to consider the fact that small marks are more likely to be confused than large marks, and that, therefore, where the marks

C. A. 1886 *In re* LYNDON'S TRADE-MARK. Fry, L.J.

are small, it may well be incumbent on the person who seeks to register the second trade-mark, to make it more different from the trade-mark already on the register than would be requisite if the marks were used on a large scale, so that small differences would be easily visible. I agree with what the Master of the Rolls said in *In re Rosing's Application* (1) that you must have regard to size, and I think you must also have regard to the material upon which the mark is to be impressed, and also to the natural imperfections of the impressions. I think you must have also regard to the natural effect of wear and tear of the marked goods on the trade-mark. I think all those things may be fairly looked at, and I am far from sure in the present case that Messrs. *Bedford* might not have been able to substantiate their objection if they had put on the register the mark which they have used on their goods. But what they have put on the register is a head which has been described by Lord Justice *Bowen* as a head with sparse hair, which has no definition between the head-dress and the face; it has nothing but the stump of the neck. This is a very different design from that which they have used. They have used a head with something which looks like a wig, with a line of definition between the head-gear and the face, with something like curls behind, and with a portion of the shoulders and the breast as well as the entirety of the neck. Their trade-mark on the register and their trade-mark on their goods therefore differ in several not unimportant particulars, and in all those particulars the trade-mark on the goods approaches more nearly to the trade-mark of *Lyndon* than the trade-mark on the register does. Whether Messrs. *Bedford & Sons* could have succeeded in sustaining their objection if their experienced witnesses had made the proper comparison, and then expressed as strongly as they do their opinion that *Lyndon's* mark is calculated to deceive, I do not say—but, as they have only called the attention of their witnesses to an erroneous comparison, it is impossible to say that they have discharged the burthen imposed upon them of shewing to the Court that *Lyndon's* trade-mark is calculated to deceive.

I wish to add that I express no opinion on the point which has not been argued, but to which Lord Justice *Cotton* has referred,

(1) 54 L. J. (Ch.) 975.

C. A. 1886 *In re* LYNDON'S TRADE-MARK.

viz., whether the Act of 1883 enables a person who has not used a trade-mark on any particular class of goods to obtain any title by a mere registration of that mark.

Solicitors for Applicant: *Fallows & Rider*, agents for *W. Fallows, Birmingham.*

Solicitors for Opponents: *Cattarns, Jehu, & Hughes*, agents for *Young, Wilson, & Co., Sheffield.*

H. C. J.

---

C. A. 1886 CHITTY, J. *Feb.* 20, 22, 25. C. A. *March* 3.

## *In re* BUSFIELD. WHALEY *v.* BUSFIELD.

[1886 B. 603.]

*Practice—Service out of the Jurisdiction — Rules of Supreme Court*, 1883, *Orders* XI.; LXVII., *rr.* 5, 6; LXXII., *r.* 2—*Repeal of Act, qualified*—46 & 47 *Vict. c.* 49, *s.* 5.

*Held* (affirming the decision of Mr. Justice *Chitty*), that the Court cannot order service of an originating summons out of the jurisdiction.

Effect of a qualified repealing section considered.

ON the 4th of February, 1886, *M. F. Whaley*, one of the residuary legatees under the will of *John Busfield*, took out an originating summons against the two executors and trustees of the will, asking for the usual accounts of the testator's real and personal estate, with an inquiry as to sales of his real estate, and an inquiry who were entitled to the residue. Mrs. *Busfield*, one of the trustees and executors, was temporarily resident at *Avignon*. The Plaintiff applied to Mr. Justice *Chitty* for leave to serve the summons on her out of the jurisdiction.

The application came on for hearing before Mr. Justice *Chitty* on the 20th of February, 1886.

*Sturges*, in support of the application, referred to the Rules of the Supreme Court, 1883, Orders XI.; LXVII., rules 5, 6; LXXII., rule 2; Consolidated Orders, 1860, Order X., rule 7, and cited *Weldon* v. *Gounod* (1); *Credits Gerundeuse* v. *Van Weede* (2); *In*

(1) 15 Q. B. D. 622. (2) 12 Q. B. D. 171.

C. A. 1886 In re BUSFIELD. WHALEY v. BUSFIELD.

*re Fawsitt* (1); *In re Bonelli's Electric Telegraph Company* (2); *In re Haney's Trusts* (3), and *In re British Imperial Corporation* (4), and contended that if Order XI. was exhaustive, then a defendant by simply going across the border might stop an action commenced by originating summons altogether, and that no petition under the *Trustee Acts* or *Settled Land Act* could be served on an Englishman abroad.

CHITTY, J.:—

This is an application for leave to serve an originating summons out of the jurisdiction, namely, in *France*. The circumstances are such that an order could properly be made if the action had been commenced by writ of summons.

Order XI. of the Rules of the Supreme Court, 1883, is the only Order which deals especially with service out of the jurisdiction, and it applies in terms only to the service of a writ of summons and a notice of a writ. The rules embodied in this Order are founded on general principles of jurisprudence; and in the framing of these rules the whole subject has obviously been reconsidered and attention has been directed to the views entertained by the Courts of *Scotland* and *Ireland*, and by foreign Governments, particularly that of *Germany*. The rules treat particular cases with care and precision, and define and limit the authority of the Court. In the appendix, forms for writs and notices of writs for service out of the jurisdiction are given; but no provision is made by the rules nor is any form provided in the appendices for service of an originating summons out of the jurisdiction. Nor is there any rule bringing an originating summons within Order XI., or making an originating summons equivalent to a writ; although the 4th rule of Order IV. brings a petition and originating summons within that Order.

In *In re Fawsitt* it was held that an originating summons taken out under Order LV., rule 3, is a civil proceeding commenced otherwise than by writ, in manner prescribed by a rule of Court, and is consequently an action within the definition

(1) 30 Ch. D. 231.
(2) Law Rep. 18 Eq. 655.
(3) Law Rep. 10 Ch. 275.
(4) 5 Ch. D. 749.

of that word in sect. 100 of the *Judicature Act*, 1873. This decision shews that the proceedings commenced by an originating summons are an action, but it does not shew that an originating summons is a writ.

In the argument reference was made to Order LXVII., rule 5, but that relates exclusively to the manner in which personal service is effected and is quite foreign to the present question.

It seems to me that the only ground upon which the application can be supported is that founded on Order LXXII., rule 2, which provides that where no other provision is made by the Acts or the Rules of 1883, the then existing procedure and practice are to remain in force.

This gives rise to the question what was the procedure and practice as to an originating summons when the Acts and Rules referred to came into force.

In my Chambers two chief clerks of great experience cannot call to mind any instance in which an order has been made for service of an originating summons out of the jurisdiction, and the other chief clerk can recollect one occasion only where the application was made and refused, and the refusal was acquiesced in and a writ issued. Counsel mentioned one case in which such an order was made in the Chambers of Mr. Justice *Pearson*, but it does not appear that the order was made by the Judge himself.

The Registrar has made a search in the office and has produced only two orders, one made in the Chambers of Vice-Chancellor *Hall* in 1870, and the other in the Chambers of Vice-Chancellor *Malins* in 1874. In both of these cases the order was made before the Judicature Rules came into force, and was for service of the originating summons in *Scotland*. From the best inquiry I have been able to make I cannot find that there was any established practice on the subject.

But assuming there was such a practice subsisting when the Orders of 1883 came into force, some further matters have to be considered.

An originating summons first arose under 15 & 16 Vict. c. 86, s. 45, and was confined to the simple case of an order for the administration of the personal estate of a dead man. This provision was left untouched until the Orders of 1883 were issued,

C. A. 1886 *In re* BUSFIELD. WHALEY *v.* BUSFIELD. Chitty, J.

which for the first time dealt with the Chancery Consolidated Orders of 1860 as a whole.

An originating summons is now issued under Order LV. of the Rules of 1883. This order has greatly enlarged the scope of an originating summons and made it applicable to new subjects, as for instance, the execution of trusts. By the Orders of December, 1885, the scope has been still further extended. The main difference between a writ of summons and an originating summons is, that in the one case the proceedings are in Court, and there are or may be pleadings, whereas in the other case the proceedings are in Chambers, and there are no pleadings. As to all the numerous cases to which by the Orders of 1883 and 1885 an originating summons was for the first time extended, it is obvious that there could not have been any previously existing practice.

The authority of the Court to order service of an originating summons out of the jurisdiction depended at the time when the Rules of 1883 came into force on the Consolidated Orders of 1860, and particularly on Order X., r. 7.

This rule related to any suit in which the defendant was out of the jurisdiction, and did not contain any of the restrictions or limitations found in Order XI. of the Rules of the Supreme Court, 1883.

In the case of *Cookney* v. *Anderson* (1) an application was made for leave to serve a copy of the bill upon the defendants in *Scotland*, and was refused by Lord *Westbury*, on the ground that the words "any suit" in rule 7 of Order X. of the Consolidated Orders of 1860 must be taken to denote such suits only as are described in 2 Will. 4, c. 33, and 4 & 5 Will. 4, c. 82, and that the rule read in a more extensive sense was *ultrà vires*.

This decision was subsequently overruled by Lord *Chelmsford* and Lord Justice *Turner* in *Drummond* v. *Drummond* (2), and the validity of the general Order was established.

In the interval between these two decisions the case of *In re Alcan's Estate* (3) was decided by the Lords Justices, and leave was there given to serve an administration summons relating to stocks and shares in *England* on a defendant abroad. This

(1) 1 D. J. & S. 365. (2) Law Rep. 2 Ch. 32.
(3) 1 D. J. & S. 398.

decision therefore did not conflict with Lord *Westbury*'s decision in *Cookney* v. *Anderson* (1), for the case fell within the statutes of Will. 4. These statutes relate to service out of the jurisdiction in certain specified suits only, namely, those concerning land, or any charge, lien, judgment, or incumbrance thereon, or concerning stock or shares within the jurisdiction.

The result of these authorities, however, is sufficient to shew that up to 1883 there was power to order service out of the jurisdiction in any suit in equity by virtue of Order x., r. 7, of the Consolidated Orders of 1860.

But by the introductory rule of the Orders of 1883 the Consolidated Orders of 1860 are wholly repealed without any qualification, so that the Order which gave jurisdiction "to serve out of the jurisdiction" is gone.

I think that the repeal of that Order, and the express provisions of Order xi. of the Rules of the Supreme Court, 1883, when read together, are sufficient to shew that Order xi. was intended to be exhaustive so far as relates to actions.

If it were otherwise there would be this strange anomaly, that the Court would order service of an originating summons out of the jurisdiction in one case only, namely, where the summons relates simply to the administration of personal estate, and could make an order for such service without being subject to any of the restrictions or limitations as to place, or the nature of the case, or the like, which, under Order xi., are made applicable to writs and notices of writs. In other words, in the particular case of an originating summons for the administration of personal estate, the Court would have a much larger jurisdiction than it would possess in the case of a writ for the same purpose.

I think that Order lxxii., rule 2, cannot be so read or construed as to produce this extraordinary result.

For these reasons I hold that an originating summons cannot be served out of the jurisdiction. In regard to the decisions bearing on the general question, there is that of *Weldon* v. *Gounod* (2), where the Court held that there was no power to order service out of the jurisdiction of a summons for the appointment of a receiver by way of execution on a judgment.

(1) 1 D. J. & S. 365. (2) 15 Q. B. D. 622.

C. A. 1886 *In re* BUSFIELD. WHALEY *v.* BUSFIELD. Chitty, J.

In that case the Divisional Court relied on the absence of any rule authorizing the service.

In another case, of which I can find a report only in the *Law Times* for the 23rd of January, 1886, p. 211, an application for leave to serve a summons for taxation of a bill of costs out of the jurisdiction was refused.

To avoid misconception, I think it right to add that Order XI. is not necessarily exhaustive as to service out of the jurisdiction, except in the case of actions. For there are other cases, such as originating petitions and proceedings in a winding-up.

Now the Winding-up Orders of 1862 were left untouched by the Rules of the Supreme Court, 1883, and also by the Rules of December, 1885, except only in the matter of appointing a provisional liquidator. There was undoubtedly at the time when the Orders of 1883 came into force a well-established practice for service of summonses under a winding-up order out of the jurisdiction.

It appears to me that this practice is preserved.

My judgment leaves unaffected any question as to the serving of petitions out of the jurisdiction.

The cases of *In re Bonelli's Electric Telegraph Company* (1), *In re Haney's Trusts* (2), and *In re British Imperial Corporation* (3), decided before the Orders of 1883 came into force, shew that petitions under the *Trustee Relief Act* could be served out of the jurisdiction.

G. M.

C. A.

The application was renewed before the Court of Appeal on the 3rd of March, 1886.

*Sturges*, for the application :—

Order XI. of the Rules of 1883 is the one which governs service out of the jurisdiction, and the difficulty arises on its terms, which, taken strictly, apply only to a writ of summons. Mr. Justice *Chitty* thought that Order LXVII., rule 5, did not apply, but I submit that it does. This is a case where personal service

(1) Law Rep. 18 Eq. 655. (2) Law Rep. 10 Ch. 275.
(3) 5 Ch. D. 749.

of a summons is necessary, and the rule provides that it shall be effected in the same way as service of a writ of summons.

[FRY, L.J.:—Is not the question this, whether the Court has, apart from the Rules, any inherent power to order service out of the jurisdiction, and if not, do the Rules give it?]

Order LXXII., rule 2, preserves the old practice where the rules make no other provision, so if before the rules the Court had power, by statute or otherwise, to order such service, that power is not taken away. In *Credits Gerundeuse* v. *Van Weede* (1) service out of the jurisdiction was allowed.

[COTTON, L.J.:—That case appears to go on the ground that the object of the service was only to give notice of the proceedings.]

In *Weldon* v. *Gounod* (2) the Divisional Court appears to have taken the same view as has been taken here by Mr. Justice *Chitty*. The case went before the Court of Appeal, which did not decide the question of jurisdiction. Under the Rules of 1875 several documents other than writs of summons have been served out of the jurisdiction, as in *In re Bonelli's Electric Telegraph Company* (3).

[COTTON, L.J.:—Service of a petition under the *Trustee Relief Act* is quite different, the Court there is only giving a party notice that if he does not come in it will deal with the fund in his absence. *Re Naylor's Residuary Personal Estate* (4) shews the principle.]

*In re Haney's Trusts* (5) was also under the *Trustee Relief Act*. In *In re British Imperial Corporation* (6) leave was given to serve out of the jurisdiction summonses under sect. 165 of the *Companies Act*, 1862. Mr. Justice *Chitty* distinguished that case by saying that there was a settled practice in winding-up with which the *Judicature Acts* and Rules did not interfere. In *In re Mewburn's Settled Estates* (7) leave to serve a petition under the *Settled Estates*

(1) 12 Q. B. D. 171.
(2) 15 Q. B. D. 622.
(3) Law Rep. 18 Eq. 655.
(4) 28 L. T. (N.S.) 18.
(5) Law Rep. 10 Ch. 275.
(6) 5 Ch. D. 749.
(7) W. N. 1874, p. 156; 22 W. R. 752.

C. A. 1886 *In re* BUSFIELD. WHALEY *v.* BUSFIELD.

*Act* out of the jurisdiction was refused, and in *Re Maugham* (1) leave to serve out of the jurisdiction an application for taxation of a solicitor's bill was refused. In *In re Alcan's Estate* (2) service of an administration summons abroad was ordered by the Court of Appeal. That case turned on the statutes 2 Will. 4, c. 33, and 4 & 5 Will. 4, c. 82. The first of those statutes was repealed by 44 & 45 Vict. c. 59, and the latter by 42 & 43 Vict. c. 59, and by 46 & 47 Vict. c. 49, s. 4, but that Act, sect. 5, provides that "The repeal effected by this Act shall not affect (*a*) . . . (*b*) any jurisdiction or principle or rule of law or equity established or confirmed, or right or privilege acquired, or duty or liability imposed or incurred, or compensation secured by or under any enactment repealed by this Act." That sub-section was considered in *Sayers* v. *Collyer* (3), and was dealt with in a way that supports my contention that the jurisdiction which the Court exercised in *In re Alcan's Estate* remains. Each of the other repealing Acts contains a similar provision. The Court had jurisdiction under the Consolidated Orders, and that jurisdiction is preserved by Order LXXII., rule 2.

[FRY, L.J.:—The Consolidated Orders have been repealed.]

The decision of Mr. Justice *Chitty* will paralyze the proceeding by originating summons, for it rarely can be known whether it will not be necessary to bring before the Court in the course of the proceedings someone who is resident out of the jurisdiction, and anybody who knew he was going to be served with a summons might defeat the proceedings by going out of the jurisdiction.

[*Drummond* v. *Drummond* (4) was also referred to.]

COTTON, L.J.:—

This is an important question, and we should not have given judgment at once if we had not had, as I believe, every case bearing on the subject brought to our attention. The question is whether the Court can order service of an originating summons

(1) 22 W. R. 748.
(2) 1 D. J. & S. 398.
(3) 28 Ch. D. 103.
(4) Law Rep. 2 Ch. 32.

on a trustee who is out of the jurisdiction. Service out of the jurisdiction is an interference with the ordinary course of the law, for generally Courts exercise jurisdiction only over persons who are within the territorial limits of their jurisdiction. If an Act of Parliament gives them jurisdiction over British subjects wherever they may be, such jurisdiction is valid, but apart from statute a Court has no power to exercise jurisdiction over anyone beyond its limits. We must deal with the present case under the General Orders of 1883, and there is nothing in them to authorize service of an originating summons out of the jurisdiction. The general Order as to service out of the jurisdiction was in my opinion intended to form a complete code on that subject, and to shew when such service could, and when it could not, be effected. Now rule 1 applies in terms to writs of summons, and to nothing else, and it cannot be urged that Order XI. taken alone gives power to serve an originating summons out of the jurisdiction. It is urged that the old practice in this respect remains, because Order LXXII., rule 2, saves the old practice and procedure "where no other provision is made by the Acts or these Rules." I think that other provision is made by the Acts and Rules; but apart from that I think it would be wrong to say that this rule saves any practice which depends solely on an Act of Parliament which has been repealed, or on a rule which has been abrogated. It has been argued that Order LXVII., rule 5, meets the case; "Where personal service of any writ, notice, pleading, order, summons, warrant, or other document, proceeding, or written communication is required by these Rules or otherwise, the service shall be effected as nearly as may be in the manner prescribed for the personal service of a writ of summons." It is said that this puts service of an originating summons on the same footing as that of a writ of summons. In my opinion that rule deals merely with the mode of effecting personal service, and is only applicable where personal service can be effectually made, and was not intended to introduce in the case of all documents requiring personal service an extraordinary power of service out of the jurisdiction, which is by another order given in terms confining it to a writ of summons.

It has been urged that the power to order service out of the

C. A. 1886 *In re* BUSFIELD. WHALEY *v.* BUSFIELD. Cotton, L.J.

jurisdiction which was conferred by the Acts 2 Will. 4, c. 33, and 4 & 5 Will. 4, c. 82, is still subsisting, notwithstanding the repeal of those Acts, and no doubt the Act 46 & 47 Vict. c. 49, and each of the other repealing Acts, contains a saving clause which provides that the repeal is not to affect any jurisdiction established by any enactment repealed by the Act. But where, as here, we have a code of rules providing for service out of the jurisdiction, I think it would be wrong to hold that by virtue of this saving clause a further jurisdiction exists under a statute which has been repealed.

As regards the cases referred to, the first, *Credits Gerundeuse* v. *Van Weede* (1), was a case of interpleader, and the decision may perhaps be supported on the ground that the object of service was not to give jurisdiction over the party served, but only to give him notice of a proceeding affecting his rights, that he might if he pleased come in and defend them, and it is on this that Baron *Pollock* rests his judgment. In the next, *Weldon* v. *Gounod* (2), an application to serve out of the jurisdiction a summons for the appointment of a receiver was refused. Then there were two cases under the *Trustee Relief Act—In re Bonelli's Electric Telegraph Company* (3), and *In re Haney's Trusts* (4). They appear to be referable to the principle acted upon by Baron *Pollock* in *Credits Gerundeuse* v. *Van Weede*, and in *Re Naylor's Residuary Personal Estate* (5) Vice-Chancellor *Wickens* refused to order service out of the jurisdiction under the *Trustee Relief Act* on an adverse claimant, and proceeded in her absence. Where anything like jurisdiction over the person has been sought to be exercised, leave to serve abroad in cases not coming within the terms of Order XI., has been refused as in *Re Maugham* (6), and *In re Mewburn's Settled Estates* (7). In my opinion the principle laid down by the late Master of the Rolls is correct, that the Court has no power to order service out of the jurisdiction except where it is authorized by statute to do so. In the present case in my opinion there is no such statutory power, and the application must be refused.

(1) 12 Q. B. D. 171.
(2) 15 Q. B. D. 622.
(3) Law Rep. 18 Eq. 655.
(4) Law Rep. 10 Ch. 275.
(5) 28 L. T. (N.S.) 18.
(6) 22 W. R. 748.
(7) 22 W. R. 752.

C. A.
1886
*In re* BUSFIELD.
WHALEY *v.* BUSFIELD.

BOWEN, L.J. —

I am of the same opinion, and think that the judgment of Mr. Justice *Chitty* proceeds on correct principles.

FRY, L.J. :—

I am of the same opinion. I think that the General Orders of 1883 contain a complete code governing service out of the jurisdiction.

COTTON, L.J. :—

I say nothing as to the cases in winding-up under the *Companies Acts*. Whether they are well decided must be determined when the point arises.

Solicitor: *J. Fraser.*

H. C. J.

---

## DE MORA *v.* CONCHA.

C. A.
1886
V.-C. B.
*Feb.* 5.
C. A.
*March* 10.

[1860 D. 101.]

*Practice—Cross-examination of Affidavit Witness—Evidence on Inquiry after Trial—Rules of Supreme Court, Order* XXXVIII., *r.* 28; *Order* XXXVII., *rr.* 1, 5, 21, 22; *Order* XXXVIII., *r.* 21.

On an inquiry added to a decree, *A.* filed an affidavit by a person resident in *South America*, applying not only to the subject-matter of the inquiry, but to another matter as to which an inquiry had not yet been, but was afterwards, directed. The affidavit was read in Court on the first inquiry. When the second inquiry was being prosecuted *A.* gave notice to read the affidavit, upon which the opposite party gave a notice that he required to cross-examine the deponent, not saying when, where, or before whom :—

*Held*, by *Bacon*, V.C., that the affidavit could not be read till the deponent had been produced for cross-examination.

*Held*, on appeal, that Order XXXVIII., r. 28, excluding an affidavit from being read, except by special leave, unless the deponent is produced for cross-examination (supposing that Order XXXVII., rr. 21, 22, makes that rule applicable to evidence on an inquiry), did not exclude the present affidavit, as the notice did not comply with the rule, and that the rejection of the affidavit could not be sustained :

*Held*, further, that the Court under Order XXXVII., rr. 1, 5, could make such order for cross-examination as was requisite for the purposes of justice, but that under the special circumstances of the present case it would not

C. A.
1886
DE MORA
v.
CONCHA.

direct that the witness should be cross-examined before his evidence was received, but would leave the opposite party at liberty to make within fourteen days any application he might be advised for cross-examination of the witness.

Whether Order XXXVIII., r. 28, applies in the case of a witness who is resident out of the jurisdiction, *quære*.

*JUAN JOSÉ CONCHA*, a wealthy native of *Chili*, made his will in *England*, and died in February, 1860, leaving an only child, *Adelinda Concha*, whose legitimacy was disputed, as was also the testator's domicil. Upon the testator's death a complicated litigation ensued as to his property, an outline of which is given in *De Mora* v. *Concha* (1). Part of the claim of the daughter was that on the death of her mother, *Maria Concha*, who died in the testator's lifetime, she had become entitled, according to the law of *Chili*, to one-half of all the *gananciales* or acquisitions of her father and mother during their coverture. In 1878 the daughter and her husband applied by summons that in addition to the accounts and inquiries directed by the decree made in November, 1860, inquiries should be directed as to the marriage and issue of *Juan José Concha*, as to his domicil at his death, as to what part of his property he was able to dispose of and had disposed of by his will, and who were entitled to so much of his personal estate as was not effectually disposed of by his will. Vice-Chancellor *Bacon*, on the 20th of July, 1878, ordered an inquiry whether the testator was ever married and to whom, and whether there was any and what lawful issue of any marriage of the testator; and ordered the rest of the application to stand over till that inquiry had been answered.

Upon this inquiry *Adelinda Concha* and her husband adduced forty affidavits, many of which were not confined to the questions of the marriage and issue, but went into the question of the amount of *gananciales*. One of these was an affidavit of *Julian Concha*, made on the 7th of September, 1877, but not filed until the 10th of June, 1879. The deponents were nearly all resident in *Peru* or *Chili*.

On the 23rd of February, 1882, Vice-Chancellor *Bacon* made an order directing a commission to issue for the cross-examination of

(1) 29 Ch. D. 268.

the witnesses who had made affidavits, and for the examination of witnesses in *Peru* and *Chili*. This order was made on the application of the Defendant, *Trinidad Concha*, the residuary legatee, who, as stated by the order, had the "conduct on behalf of the estate of the testator *J. J. Concha* of the inquiry directed by the order dated the 20th of July, 1878," and it gave him liberty "to cross-examine *vivâ voce* the witnesses named in the schedule hereto who have made affidavits on behalf of the said *M. A. Concha* and *Adelinda Concha* upon the matters in question in the said inquiry, or arising out of the answers thereto of such witnesses, with liberty to the said *M. A. Concha* and *Adelinda Concha* to re-examine their own witnesses *vivâ voce* on matters arising out of such cross-examination." The order also gave powers for examination and cross-examination of other witnesses, but in each case "upon the matters in question in the said inquiry."

*Julian Concha* was cross-examined under this commission, but was not asked any questions about what he had said in his affidavit bearing upon the *gananciales*.

In 1884 it was found in answer to the above inquiry that the testator had been married to *Maria*, the mother of *Adelinda Concha*, and that *Adelinda* was the only lawful issue of the testator. On the 19th of July, 1884, Vice-Chancellor *Bacon* made an order directing inquiries as to the domicil of *Juan José Concha* at his death, and as to what part of his property he was able to dispose of and had disposed of by his will, and whether *Adelinda* became on the death of her mother entitled under the law of *Peru* or *Chili* to any and what share of the community or partnership property that *J. J. Concha* and *Maria Concha* acquired during their marriage and existing at the death of *Maria Concha*, and "of what such community or partnership property consisted at the death of the said *Maria Concha*."

Notice was served on *Trinidad Concha* of the intention to read on the last-mentioned inquiry nineteen of the affidavits which had been filed upon the inquiry as to the marriage, and among them the affidavit of *Julian Concha*. *Trinidad Concha* then gave notice in writing on the 19th of February, 1885, that he required to cross-examine all the deponents. Seven of them at this time were dead. *Adelinda Concha* and her husband thereupon took out

C. A. 1886 DE MORA v. CONCHA.

a summons that the affidavits might be received without production of the deponents for cross-examination, and on the 28th of April, 1885, the Vice-Chancellor, upon the summons being adjourned into Court, refused to allow the affidavits, particularly that of *Julian Concha*, to be received in evidence without cross-examination, but made an order that they should be tendered in evidence without production of the deponents for cross-examination, saving all just exceptions. The inquiry then proceeded in Chambers, and on the affidavit of *Julian Concha* being tendered it was objected to as not admissible in evidence till the deponent had been cross-examined. The Chief Clerk allowed the objection, whereupon the matter was adjourned to the Judge in Court.

The application was heard before Vice-Chancellor *Bacon* on the 5th of February, 1886.

*Fischer*, Q.C., and *James Kaye*, for *Adelinda Concha* and her husband.

*Seward Brice*, for the Defendant *Trinidad Concha*, relied on Rules of Supreme Court, 1883, Order XXXVIII., r. 28, as prohibiting the affidavit to be used as evidence without cross-examination. He also referred, upon the old practice under Cons. Ord. of the 6th of February, 1861, r. 19, to *Bingley* v. *Marshall* (1) and *Parker* v. *M'Kenna* (2).

*Fischer*, in reply, referred to rule 21 of Order XXXVIII.

BACON, V.C.:—

The practice of this Court is very plain. Under the 21st rule of Order XXXVIII., which is a very wholesome rule, affidavits made at any time in the course of the proceedings "may be used" in Chambers. The 28th rule of Order XXXVIII. is equally explicit: "When the evidence is taken by affidavit, any party desiring to cross-examine a deponent who has made an affidavit filed on behalf of the opposite party may serve upon the party by whom such affidavit has been filed a notice in writing, requiring the production of the deponent for cross-examination at the trial, such notice to be served at any time before the expiration

(1) 6 L. T. (N.S.) 682. (2) 43 L. J. (Ch.) 802.

of fourteen days next after the end of the time allowed for filing affidavits in reply, or within such time as in any case the Court or a Judge may specially appoint; and unless such deponent is produced accordingly, his affidavit shall not be used as evidence" unless by special leave.

The words in the 28th rule are quite different from the words in the 21st. The affidavit "may be used" under the 21st rule, but it cannot be used in evidence under the 28th rule unless the requisition to produce the witness has been complied with, except by the leave of the Court. In the case that is before me the question is whether leave should be given to use the affidavit of *Julian Concha* without his being cross-examined.

Now there was a commission to *South America*, no doubt a long time ago, and the attention of both parties was then directed to only one question—the most important question in the cause, that is to say, the marriage of the testator with the mother of the present applicant, *Adelinda Concha*. The whole cross-examination was confined to that subject, and if, in the result, the evidence had displaced the fact of marriage, there would have been no other question in the case, unless, perhaps, the question of domicil might have been still capable of being blown into some sort of animation. In the course of the cross-examination no question whatever was put on the issue which now presents itself as to the *gananciales*. At that time the present Defendant had in her possession this affidavit by *Julian Concha*, made in 1877, and not filed until 1879, relating, as I understand from the statement of both parties, to the *gananciales* particularly. It is nearly ten years ago that the evidence, such as it is, in that affidavit, was taken: it has since been tendered, but no more than tendered. When the application was made to me in April last, I distinctly refused to admit the affidavit as evidence, but I did order that it might be tendered "saving all just exceptions." An exception is now taken founded on the 28th rule of Order XXXVIII. Am I to disregard that rule? Am I to make a precedent that the rule is to be disregarded, and that the Court, in its discretion, or its plenary authority, will admit as evidence an affidavit which the law says is not evidence until the party making it has been cross-examined? The order having been made that the affidavit in

C. A. 1886 DE MORA v. CONCHA. V.-C. B.

question should be tendered—not used, but "tendered," "saving all just exceptions"—it is tendered, and the exception taken to it is that the deponent has not been cross-examined, and that the affidavit cannot be taken into consideration as evidence—in the words of the 28th rule "shall not be used as evidence"—unless he is first cross-examined. I cannot say that I think the Chief Clerk was wrong in what he decided. His note to me is this: "The Plaintiff has tendered in evidence affidavits which were filed on the question of legitimacy, and which also contain statements relating to the inquiry. The deponents were cross-examined by the Defendants on the affidavit under the commission, but with the exception of one deponent the cross-examination was confined to the question of legitimacy, and the order directing the commission limits it to that. Both parties were agreed that that was the question which was to be investigated by means of the commission. The Plaintiff tenders an affidavit under the inquiries directed by the order, and the Defendant claims his right to cross-examine the deponents, which, of course, will involve another commission to *Peru*. An order has been made allowing the Plaintiff to tender that affidavit saving all just exceptions." The Chief Clerk then goes on to say, "I have considered that this ought not to deprive the Defendant of his right to cross-examine, and I have therefore refused to receive the affidavit."

Then the matter is adjourned to me in Court. Can I say an affidavit made by a man in the year 1877 is to be admitted without that wholesome check which is prescribed by the 28th rule, and which is consistent with all the rules of evidence prevailing in this and, as far as I know, in every other country? I cannot, in my opinion, refuse the application which *Trinidad Concha* makes to have this matter tested by cross-examination.

I have forborne to say anything about the circumstances of this case. It is nearly thirty years old, and it relates to a large sum of money. It is very romantic in some of its incidents. It is very strange and very important in one particular incident, namely, the *gananciales*. I think that, until the deponent, who swore his affidavit in 1877, but which affidavit was not filed until 1879, has been cross-examined, although it may be tendered in evidence, it cannot be received as evidence, because the Defendant

excepts to it on the ground that Order XXXVIII. gives him a protection of which he will be deprived if I admit that affidavit as evidence.

G. I. F. C.

From this decision *Adelinda Concha* and her husband appealed. The appeal was heard on the 10th of March, 1886.

*Fischer*, Q.C., and *Stewart Smith*, for the appeal :—

We say in the first place that *Trinidad Concha* has had an opportunity of cross-examination. He obtained in 1882 a commission to cross-examine the witnesses who had made affidavits, and under it he did examine one of the witnesses on the subject of the *gananciales* as well as the marriage, and he ought to have cross-examined them all.

[FRY, L.J.:—If he was bound to cross-examine then or never on this point no effect is given to the Vice-Chancellor's confining the inquiry to the marriage.]

Supposing we are wrong on that, we say that the evidence cannot be rejected because the deponent is not produced for cross-examination. By Order XXXVIII., rule 21, all affidavits which have been previously made and read in Court may be used before the Judge in Chambers, and this affidavit has been so read.

[FRY, L.J. :—Is not the question this, whether, when an affidavit witness is resident abroad, the opposite party can call on the person using his affidavit to produce him for cross-examination, or whether he must apply for a commission to cross-examine him ?]

The evidence of a witness abroad might under the old practice be read without cross-examination : *Fry* v. *Wood* (1) and *Taylor* on Evidence (2). Order XXXVIII., rule 28, provides, in the case of trial on affidavit, that unless the party filing the affidavit produces the deponent for cross-examination, if called on to do so, the affidavit shall not be read except by special leave. That applies to fresh evidence, not to evidence which has been already before

(1) 1 Atk. 445.

(2) 6th Ed. vol. i. p. 464.

C. A. 1886 — DE MORA v. CONCHA.

the Court, and is sought to be used in Chambers. The two rules are considered together in *In re Baker* (1).

[BOWEN, L.J.:—Which rule applies in your case as to what your opponent is entitled to apply for?]

There does not appear to be any rule distinctly pointing at this particular question, but Order XXXVII., rule 5, seems to cover it, and to give the Court power to do what is just under the circumstances. A similar rule in the Orders of 1875 was acted upon in *In re Boyse* (2). This is not a *bonâ fide* application to cross-examine. *Trinidad Concha* calls for the production of the whole batch of witnesses, though he knows perfectly well that several of them are dead, and the production of several others was dispensed with on the former cross-examination.

[FRY, L.J.:—It does not follow because their cross-examination was immaterial on one inquiry that it is so on another.]

*Seward Brice*, for *Trinidad Concha*:—

I contend that it is the duty of *Adelinda Concha* to produce the witness for cross-examination here or somewhere else; and *In re Boyse* in fact decides it.

[FRY, L.J.:—I do not think that that case has any bearing on the present.

COTTON, L.J.:—I do not see that it has.]

It shews an obligation on the person filing the affidavit to produce the witness for cross-examination, and therefore *Trinidad Concha* is not the person whose duty it is to get at the witness. The case is no doubt not within the terms of Order XXXVIII., rule 28, but if that rule and Order XXXVII., rules 21, 22, be taken together, they provide that the witness shall be produced at what is the trial or hearing of the particular matter. In *Bingley* v. *Marshall* (3) the affidavit of a material witness who had left the country was not allowed to be read, and *Nadin* v. *Bassett* (4) proceeds on the same principle. The General Orders make no distinction in the case of witnesses out of the jurisdiction.

(1) 29 Ch. D. 711.
(2) 20 Ch. D. 760.
(3) 6 L. T. (N.S.) 682.
(4) 25 Ch. D. 21.

[BOWEN, L.J.:—It seems to me that under Order XXXVII., rule 1, we have jurisdiction to say that the affidavit shall be admitted subject to a condition that a commission to cross-examine shall be issued if cause is shewn.]

*Fischer*, in reply.

COTTON, L.J.:—

This is an appeal from an order of Vice-Chancellor *Bacon* that the affidavit of a certain witness, *Julian Concha*, shall not be read until he has been produced for cross-examination on his affidavit, which it is proposed to read on the pending inquiry what was the partnership property of the father and the mother of *Adelinda Concha* acquired during their marriage and existing at the death of the mother. It is urged by Mr. *Brice*, who appears for the Respondent, a gentleman who has the conduct of these proceedings as representing the testator's estate, but who really is principally interested as residuary legatee, that the order is right. He admitted that he could not say that the case came within the terms of Order XXXVIII., rule 28, and I think he was right in that admission. That rule provides that any one who desires to cross-examine a witness who has made an affidavit, may give notice for the production of that witness for cross-examination at the trial, and then rule 29 appears to point at the witness being a witness who can be compelled to appear here in order to be cross-examined. It is therefore a question whether rule 28 applies when the deponent is out of the jurisdiction and cannot be compelled to attend, but the question does not call for decision, and I give no opinion upon it. The notice in the present case does not require the production of the witness at any given place or before any given person, but only states that *Trinidad Concha* requires to cross-examine all the witnesses whose affidavits *Adelinda* proposes to read. The notice, therefore, does not comply with the rule, and is insufficient. Assuming then, that Order XXXVII., rules 21, 22, makes Order XXXVIII., rule 28, applicable to proceedings on an inquiry, I am of opinion that, as the Respondent has not given such a notice as is required by that rule, the rejection of the evidence cannot be supported.

C. A. 1886 DE MORA v. CONCHA. Cotton, L.J.

Then, is this evidence to be admitted without an opportunity for cross-examination being given to an opponent who, with an honest purpose, desires it? I think not. I think that the Court has jurisdiction in a proper case and on a proper application to require witnesses who have made affidavits to be produced for cross-examination, but that must be when the application is made at such times and in such manner and for such purpose that the Court is satisfied, having regard to the terms of Order XXXVII., rule 5, that cross-examination is requisite for the purposes of justice.

I may here say that I do not agree with Mr. *Fischer's* argument that *Trinidad Concha* has already had an opportunity for cross-examination, because as I understand the order of the 23rd of February, 1882, the cross-examination of the witnesses who had made affidavits was to be upon the matters in question on the inquiry as to the legitimacy. It cannot be that the words "upon the matters in question in the said inquiry," can be referred to all matters which form the subject of the affidavits, when the words following are, "or arising out of the answers thereto of such witnesses." Both sets of words, in my opinion, limit the subject of cross-examination to the inquiry as to legitimacy. It is unfortunate that an application was not made to extend the cross-examination to all the matters in the affidavits, so as to avoid the necessity for the expense and delay of a further commission to *Chili* and *Peru* if the second inquiry had to be entered upon. This, however, was not done, and as the order stands I think that *Trinidad Concha* was not bound or entitled to cross-examine on any question but that of legitimacy.

Then, what ought to be done? The order of the Vice-Chancellor in my opinion is wrong, because the matter not coming within Order XXXVIII., rule 28, there was no right on the part of *Trinidad Concha* to have these affidavits rejected. In my opinion, however, if he had made out an honest case of desiring to cross-examine, and had explained the delay, it might have been the right course to say that the witnesses should be cross-examined on commission before their evidence was received; but in the circumstances of this case I think that it would not be right for us to make such an order. The order of the Vice-Chancellor will be discharged, but without prejudice to any

application being made by *Trinidad Concha*, if he is so advised, for an order to cross-examine these witnesses before some person to be named by the Court. I express my opinion, which I believe is the opinion of the rest of the Court, but will not form part of our order, that the Appellants, *Adelinda Concha* and her husband, are not in any way to be precluded from making any opposition they can to such an application if made, and as there has been very great delay and lengthy litigation in this case, we think it right to say that any such application by *Trinidad Concha* must be made within a fortnight from to-day.

BOWEN, L.J.:—

I should have added nothing if we had not differed from the Vice-Chancellor. It seems to me that his order cannot be sustained under Order XXXVIII., rule 28, for the simple reason that that rule applies only to the case where a party wishes to cross-examine and serves notice requiring production of the witness for cross-examination at the trial. This is not a case of a trial, but of an inquiry afterwards. Then it is said that by analogy, by virtue of Order XXXVII., rule 21, which directs that evidence is to be taken after the trial in the same way as nearly as may be as evidence taken at or with a view to the trial, you can apply the practice created under Order XXXVIII., rule 28, to a hearing after the trial, that is to say, to the hearing of an inquiry, or if not by analogy by virtue of that rule, then by virtue of the necessity of justice which requires that there should be some manner of applying to cases of inquiry the same sort of practice that applies to trials. But the Respondent is out of Court if he tries to invoke the assistance of Order XXXVII., rule 21, because he has not given the proper notice, but has given a notice served in blank, so to speak, asking to cross-examine nowhere in particular. That is a mere blocking notice, and to my mind indicates that the Respondent did not know what he wanted, but wished to embarrass. With submission to the great age and experience of the Vice-Chancellor, I think his decision erroneous; but I abstain from expressing any opinion whether Order XXXVIII., rule 28, can apply when the witness is beyond the jurisdiction. Upon that I should not like to give any opinion without further argument.

C. A. 1886 DE MORA v. CONCHA. Bowen, L.J.

Mr. *Fischer* seeks to rest his application upon rules 20 and 21 of Order XXXVIII. I would rather not say, as it is not necessary to decide the point, whether Mr. *Fischer* is right with regard to Order XXXVIII., rule 21. But we have a general power, which if not inherent in the Court is certainly given by Order XXXVII., rule 1, to deal with the matter as justice requires. That rule deals with evidence generally, and provides that "the Court or a Judge may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial, on such conditions as the Court or Judge may think reasonable." "At the hearing or trial." Applying again the Order XXXVII., rule 21, which deals with matters that happen after the trial, or indeed, applying common sense apart from that rule, it seems to me that the Court has power under Order XXXVII., rule 1, to make such order about reading the affidavit as is reasonable, and to attach such conditions to the reading of the affidavit as to prevent its reading being unjust or prejudicial to the discovery of the truth of the case. So that we have power to decide whether the affidavit shall be read, without conditions, or under any and what conditions.

Mr. *Brice's* client may say, "I have not had an opportunity of cross-examination, and to allow affidavits to be read upon which I have not had an opportunity of cross-examining would be contrary to the principles of justice, which treat cross-examination as essential to the discovery of truth." I agree that he has not had an opportunity of cross-examination, but I am not sure that it was not his business to consider when the commission was issued, whether it might not be utilized for the purpose of obtaining the evidence on all the inquiries, which could have been done at an extremely small additional expense. I am inclined to think that this case has been fought in the way in which cases sometimes are fought by a resolute litigant, who, so to speak, lies upon his back and defies the other side, letting them do their best, and taking every opportunity to object to what they do. The Respondent ought not to have an opportunity of cross-examining if he does not *bonâ fide* want cross-examination, which is part of the machinery of justice and is only meant for the purpose of justice. If the power of cross-

examination is used for the purpose of delay, that is an abuse of the process of the Court, and I think we ought to take great care whenever we have reason to think that an application to cross-examine is intended for the purpose of defeating justice or causing delay. I think that the serious expense which would be caused by the issue of another commission to *Peru* and *Chili*, whither a commission went some years ago, and the length of time which has elapsed, throw on the person who wishes to obtain a fresh commission the burden of shewing that he wants it for the purpose of justice. It seems to me that the order which Lord Justice *Cotton* read is the right one, that this affidavit should be used unless within a fortnight Mr. *Brice's* client makes out a case for putting in force the expensive machinery of a second commission.

FRY, L.J. :—

I also feel myself unable to agree with the decision at which the Vice-Chancellor arrived. The application to read the evidence of which notice was given was met by a general notice to produce all the witnesses for cross-examination. It required the production (and, according to Mr. *Brice's* reading, which I dare say is a correct one, before the Chief Clerk), no time being specified, of persons of whom some were known to be occupying offices in *Chili* which would render it impossible for them to attend, one being the President of *Chili*, and some, to the knowledge of the persons who gave the notice, were dead. I think that the notice was idle in point of substance, and I think that it was absolutely wrong in point of form, because it indicated neither time nor place at which the production was required. I think, therefore, that it might be treated as a nullity for any other purpose than that of shewing the animus of the Respondent in the application. It is provided by Order XXXVIII., rule 21, that where an affidavit has been read in the course of proceedings in Court it may afterwards be read before the Judge in Chambers. Therefore I think the affidavits were admissible evidence; but I have no doubt that under the 1st or 5th rule of Order XXXVII., or under both those rules, the Court has the power to order that witnesses who have made affidavits shall be subject to cross-

C. A. 1886 DE MORA v. CONCHA. Fry, L.J.

examination if the case requires it. I agree with what has been said by my learned Brethren in repelling the argument of Mr. *Fischer* that it was open to *Trinidad Concha* to cross-examine the witnesses on the question of the partnership property when cross-examination took place under the commission of 1882, for the inquiry then pending was limited to the question of the validity of the marriage, and the cross-examination was limited to the subject-matter of the inquiry.

Looking at the whole course of conduct pursued by the Respondent in this case, looking at his notice, and at the lapse of time that has taken place, I am satisfied that we are giving him his full rights by leaving him at liberty to apply within a fortnight for cross-examination of these witnesses. In giving that time it is understood that we neither encourage the Respondent to make any such application, nor preclude the Appellants from taking any ground they may have for resisting it.

---

Discharge the order of the Vice-Chancellor, with costs both here and below. Order the affidavit of *Julian Concha* to be admitted in evidence; but this order is not to prevent *Trinidad Concha* from making any application be may be advised within fourteen days from this date for the cross-examination of *Julian Concha* in any place in *South America* before some proper person to be appointed.

Solicitors for *Adelinda Concha* and her husband: *Worthington Evans, & Blaxland.*

Solicitors for *Trinidad Concha: Ward, Mills, Witham, & Lambert.*

H. C. J.

## BYGRAVE *v.* METROPOLITAN BOARD OF WORKS.

C. A.
1886
PEARSON, J.
*Feb.* 19.
C. A.
*March* 17.

[1885 B. 5721.]

*Vendor and Purchaser—Specific Performance—Public Undertaking—Possession —Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *ss.* 76, 85 [*Revised Ed. Statutes, vol. ix., pp.* 645, 648].

The Plaintiff, a lessee of premises required for a street improvement, contracted to sell a lease of the premises for twenty-one years to the Metropolitan Board of Works. The purchasers required an abatement on the ground that the lease was found to be determinable at the end of seven or fourteen years by the lessor. The Plaintiff claimed specific performance. Pending the action the Board applied to be let into possession on payment into Court of the whole purchase-money claimed, and *Pearson*, J., made an order for letting them into possession on their paying into Court that sum with interest:—

*Held*, on appeal, that though the Board could, by taking the steps prescribed by the *Lands Clauses Act*, have obtained immediate possession of the property, yet as they had not done so, they were in the same position as any other purchaser who was defendant to an action for specific performance, and were not entitled to have possession given to them pending the action.

*ROBERT BYGRAVE*, the Plaintiff in this action, held two houses, Nos. 82 and 84, *Red Cross Street, Southwark*, and a piece of land between them, under a lease dated December, 1883, for a term of twenty-one years from the 25th of March, 1883, determinable by either the lessor or the lessee at the end of the first seven or fourteen years thereof by six months' previous notice in writing. In June, 1884, the Metropolitan Board of Works, requiring the premises for the purpose of the *Metropolitan Street Improvements Act*, 1877, served a notice on the Plaintiff to treat for his interest. By an agreement, dated the 24th of March, 1885, the Plaintiff contracted to sell, and the Defendant Board contracted to buy, No. 82, *Red Cross Street*, at the price of £325, the agreement stated that "The estate and interest to be sold by the vendor is leasehold for the residue of a term of twenty-one years from the 25th of March, 1883." On the 15th of April, 1885, a similar contract was entered into between the Plaintiff and Defendants for the sale and purchase of the rest of the premises comprised in the lease of December, 1883, at the price of £800.

C. A. 1886 — BYGRAVE v. METROPOLITAN BOARD OF WORKS.

The contracts did not contain any stipulation as to letting the Board into possession before completion. Abstracts were delivered to, and requisitions made on behalf of, the Defendant Board. One objection taken by the requisitions was, that the lease was determinable at the end of the first seven or fourteen years by the lessor. An abatement of price was demanded, and the Board offered to pay instead of £800, £614, and instead of £325, £125. The Plaintiff claimed specific performance of the agreements of the 24th of March and the 15th of April, 1885, and payment of the full purchase-money with interest from a fixed day. The Defendant Board put in a statement of defence in which they pleaded that they were entitled to an abatement; that the prices ought to be reduced to £614 and £125; but that they were willing that the proper abatement should be determined by the Court. They had made no counter-claim. The Board had purchased and obtained a conveyance of the fee simple of the premises, subject to the Plaintiff's lease. The Plaintiff had delivered a reply to the statement of defence. The premises were vacant.

This was a motion on the part of the Defendant Board that they might be at liberty to pay into Court to the credit of the action, and to abide the result, the sums of £325 and £800 claimed, and upon such payment being made that they should be let into possession of the premises.

The motion was heard before Mr. Justice *Pearson* on the 19th of February, 1886.

*Cookson*, Q.C., and *Methold*, for the Defendants:—

The Legislature intended that a public body carrying out a public undertaking should obtain possession of property required for the undertaking pending the settlement of price. They ought not to be put in any worse position because there is a contract and a dispute on the contract. The Defendants are willing to pay the whole sum claimed, including interest, into Court, or to submit to any terms the Court thinks fit.

*Oswald*, for the Plaintiff:—

The provisions as to obtaining possession contained in the 85th section of the *Lands Clauses Consolidation Act* do not apply

to the case of a sale by agreement. The Court has no jurisdiction, in an action for specific performance, to make an interim order giving possession pending the trial. That is what is asked for here. On the pleadings the Defendants, if they are right, would not be entitled to specific performance with an abatement, since they have not put in any counter-claim, and would not, therefore, even at the hearing, obtain an order for possession.

*Cookson*, in reply.

PEARSON, J.:—

It is plain that if the Board had been proceeding compulsorily under the *Lands Clauses Consolidation Act* they would have been entitled to take possession on complying with the terms of the 85th section. The Legislature contemplated that there might not unfrequently be cases in which such a board as this, empowered to execute public works, may require to take possession before they have agreed as to price, and authorized them to take possession on giving the security provided by the section. In this case there is an agreement for sale, and the Board cannot take advantage of the 85th section. They cannot enter under the provision, which applies only to the taking of land compulsorily. The question is whether I have jurisdiction, and if so, whether I ought to exercise it, to give possession to the Board. So far as I am aware there is no case like this in the books; possibly the same circumstances never occurred before, and that may be the reason why the point has never come before any Court for decision. The houses have by agreement become the property of the Board, and the Board will be entitled to them on payment of the purchase-money. But now there is a dispute as to whether the Plaintiff has made out a title to the whole term he claimed to be entitled to; and whether he ought not, therefore, to accept an abatement. Mr. *Oswald* has pointed out what I think is a defect in the pleadings: he said, the Defendants ought not only to have pleaded in their defence their right to abatement, but also to have added a counter-claim, and asked for specific performance with an abatement. And I rather think he is right; and in order that there may be no miscarriage, if the Defendants

C. A. 1886 BYGRAVE v. METROPOLITAN BOARD OF WORKS. Pearson, J.

wish to add a counter-claim I shall give them leave to do so. And I shall treat this as if that were done: the Plaintiff must have an opportunity of putting in a defence to the counter-claim if one is added.

The simple question I have to consider is whether I ought, under the special circumstances, to give the Defendants leave to enter, and what conditions I ought to impose upon them. Under the 85th section of the *Lands Clauses Consolidation Act* the undertakers must before entry pay into the bank either the amount claimed, or, if no amount is claimed, a sum assessed by a surveyor, and also give a bond. I am inclined to think I ought to give possession, and put the Board under the same terms as they would be under if they wished to enter under the *Lands Clauses Consolidation Act*. And having regard to the provisions of that Act, I am justified in giving them possession on payment into Court of the full sum claimed, including interest. I think there ought to be some time allowed for giving up possession. As the houses are empty, I will only give fourteen days. As I understand the Board are willing, the sum of £614 and £125 may be paid at once to the Plaintiff, and the balance paid into Court.

*Oswald* declined to accept part payment without prejudice.

D. P.

C. A.

The Plaintiff appealed against this order. The appeal was heard on the 17th of March, 1886.

*Oswald*, for the Appellant:—

The Board could have obtained possession by proceeding under the *Lands Clauses Consolidation Act*, but they have not taken the steps required for the purpose. The Court therefore can only deal with them on the principles applicable to any other case of specific performance, and an interlocutory order putting a purchaser into possession pending a suit for specific performance is quite unprecedented.

*Cookson*, Q.C., and *Methold*, *contrà*:—

We have bought up the landlord's interest. The houses, which were in a ruinous condition, have been pulled down, and the

appeal is not *bonâ fide*, as is shewn by the correspondence. [Letters were put in written before the appeal was presented, by which the Plaintiff offered the company possession, and in one of them sent the key, which the Board returned.] The order is a reasonable and proper one.

[BOWEN, L.J.:—My doubt is as to the jurisdiction to make it.]

We do not strictly come within sects. 76 and 85 of the *Lands Clauses Act*, as we have not acted under them, but we say that the Court ought to act upon them by analogy, and not put us in a worse position because we have treated. We contend further, that in a specific performance suit if both parties insist on completion it ought to be held to be within the power of the Court in the exercise of its inherent jurisdiction to give possession on the utmost amount claimed being deposited.

COTTON, L.J.:—

This is an appeal by the Plaintiff in an action for specific performance from an order made by Mr. Justice *Pearson*. The Metropolitan Board of Works having power to take compulsorily the Plaintiff's leasehold interest in two houses, did not resort to the compulsory powers of the Act, but entered into an agreement with the Plaintiff for purchase of his interest at the price therein mentioned. The agreement described the estate of the vendor as leasehold for the residue of a term of twenty-one years from the 25th of March, 1883, not saying anything about the term being determinable. On investigating the title the Board found that the lease was determinable by the lessor at the end of the first seven or fourteen years. They therefore refused to complete without abatement in the price, and the Plaintiff brought this action to compel them to complete according to the terms of the agreement. They moved before Mr. Justice *Pearson* that they might be let into possession on paying into Court to abide the result of the action the whole purchase-money named in the agreement. Mr. Justice *Pearson* gave them liberty to add to their defence a counter-claim for specific performance with an abatement, and made an order letting them into possession on payment

C. A. 1886

BYGRAVE v. METROPOLITAN BOARD OF WORKS.

Cotton, L.J.

into Court of the whole purchase-money with interest. I have no doubt that the learned Judge had jurisdiction to give the leave to add a counter-claim; but was he right in making an order for letting the Defendants into possession on payment of money into Court? He appears to have considered that he could do so by analogy to the *Lands Clauses Act*, which enables a company to obtain possession of lands before the price has been ascertained. The Board might have acted under sect. 76 or sect. 85 of the Act, but they did not do so, and I am of opinion that Mr. Justice *Pearson* was in error in considering that because they could have obtained possession by certain proceedings under the Act, he had jurisdiction to give them possession on interlocutory application in an action for specific performance, when the requisitions of the Act had not been complied with.

The Plaintiff's letters written before the appeal was presented cannot make the order valid, but they shew that the appeal could not serve any useful purpose. In my opinion therefore the right order for us to make is to discharge the order appealed from, except as to costs, and to give the Appellant no costs of the appeal.

BOWEN, L.J.:—

I am of the same opinion, and should not add anything were we not differing from the Court below. Such an interference as this with the rights of an owner lawfully in possession can, as it seems to me, be justified only by some statutory power. It cannot be contended that the *Judicature Acts* give any such power. There are powers in the *Lands Clauses Act* which enable a company to take possession in a summary way, but those powers have not been resorted to, nor the conditions imposed by them complied with, so this order cannot be justified under them. Mr. *Cookson* seems to consider that the Court has a general power to do what is just and reasonable, but the Court has no power to take property from the owner except under some statutory provision. A rightful owner rightfully in possession is entitled to hold the property till it is decided in due form of law that some other person is entitled to it. If the Plaintiff in the present case is right, which cannot be

decided till the hearing, he would in the meantime under this order have, instead of the possession to which he is entitled, a claim to a sum of money which he must prosecute the suit to get.

FRY, L.J.:—

The Respondents rest their case on two grounds:—First, on analogy to the powers of the *Lands Clauses Act*. But persons who claim the benefit of those extraordinary powers must follow them strictly, and the Respondents have not complied with their conditions. Secondly, it is urged that, treating the case as one of contract, the order is right. Now the contract does not provide for possession before completion, but the order under appeal gives possession before completion. I think that the Court has no jurisdiction to modify a contract in this way, and the order therefore cannot stand, but I agree with Lord Justice *Cotton* as to the costs.

Solicitor for Defendants: *Reginald Ward.*
Solicitor for Plaintiff: *J. E. Coxwell.*

V.-C. B.
1886
Feb. 9.

## PEASE *v.* PATTINSON.

[1885 P. 458.]

*Charity—Friendly Society—Cy-près—Charitable Fund—"Voluntary Contributions"—Action—Charity Commissioners—Consent—Exemption—Charitable Trusts Act*, 1853 (16 & 17 *Vict. c.* 137), *ss.* 17, 62 [*Revised Ed. Statutes, vol. xi., pp.* 986, 999]—*A Friendly Society held to be a Charity.*

In 1862, on the occasion of an accident at the *Hartley Colliery*, in *Northumberland*, a fund was raised by voluntary subscriptions and vested in trustees for the relief of the sufferers and their families. There being an ultimate surplus, the managers of the fund proposed to apportion it among several mining districts, including *South Durham*, for the relief of suffering occasioned by colliery accidents in those districts, and in aid of relief funds already in operation there.

By the rules of a *Miners' Relief Fund Friendly Society* established in 1862 for certain counties, including the county of *Durham*, provision was made for raising funds by voluntary subscriptions among the members (required to be persons employed in coal or other mines), and by donations, for defraying the funeral expenses of members, supporting their families assisting members disabled by accident, old age or infirmity, and for payment of a sum at the death of a member:—

*Held*, in an action by the surviving trustee of the *Hartley Colliery Fund*, that the friendly society was a "charity," and that that portion of the fund intended for the *South Durham* district might be applied *cy-près* by payment to four of the trustees of the friendly society, to be applied by them, according to the rules of the society, for the relief of suffering occasioned by colliery accidents in the *South Durham* district, and for no other purpose:—

*Held* also, that the *Hartley Colliery Fund*, being a fund arising wholly from "voluntary contributions," was exempted by sect. 62 of the *Charitable Trusts Act*, 1853, from the operation of the Act, and that therefore the consent of the Charity Commissioners to the action, under sect. 17, was unnecessary.

*In re Clark's Trust* (1) considered.

In the year 1862, a sum of £81,838 19*s.* 5*d.* was raised by voluntary subscriptions for the relief of the sufferers by the accident which had lately occurred at the *Hartley* colliery in *Northumberland*, causing the death of 204 men and boys. By subsequent subscriptions this fund was increased to £83,733 8*s.* 9*d.* A general committee of the subscribers was appointed to manage

(1) 1 Ch. D. 497.

the fund, and an executive committee was appointed from that body.

At a meeting of the general committee held on the 25th of March, 1863, a report of that date of the executive committee was confirmed. This report shewed an expenditure reducing the fund to £75,442 1*s.* 1*d.*, of which the executive committee proposed to set aside a sum of £55,000 for providing assistance to the widows and families of the miners who had perished, and it was estimated that after such provision had been made there would be a surplus of £20,440, which the executive committee recommended should be divided among the twelve coal-mining districts of the country, one of which was the *South Durham* district, according to the number of coal miners in each district.

With the view of carrying this recommendation into effect, the report proposed; (1) that information should be obtained as to the number of coal miners in each district; (2) that committees should be organized in each district, three members being nominated as trustees; (3) that at the expiration of six months from the 1st of March, 1864, the then existing surplus should be handed over to the local committees in the proportion to which each might be entitled, "to be applied to the relief of suffering occasioned by colliery accidents in the way which may appear to them most desirable." The report then went on to recommend to the local committees the desirability of encouraging with the means thus placed at their disposal "the establishment of permanent relief funds in their respective localities and of aiding those already in operation."

By a further report dated the 5th of December, 1863, the executive committee reported that their plan had been favourably received by the subscribers generally, and the report contained a tabular statement shewing a proposed division of the surplus fund between the twelve districts, the amount allotted to *South Durham* being £2320 13*s.* 8*d.* This report was confirmed by the general committee and acted on, and the sum of £2320 13*s.* 8*d.* was in 1864 handed over to a local committee of three persons, of whom the Plaintiff, Sir *Joseph Whitwell Pease*, was one, as trustees for the *South Durham* district.

The *Northumberland and Durham Miners' Permanent Relief*

V.-C. B. 1886 PEASE v. PATTINSON.

*Fund Friendly Society* was a friendly society established and registered as such on the 7th of June, 1862. The rules were registered on the 1st of January, 1863, and were amended and re-registered on the 31st of January, 1884. By these rules it was provided (rule 1) that the society should be confined exclusively to the counties of *Northumberland*, *Durham*, and *Cumberland*, and *Cleveland* district; also (rule 3) that the objects of the society were the raising of funds by voluntary subscriptions among the members thereof, and by donations, to make provision, in case of fatal accidents, for defraying the funeral expenses of members and supporting their families, "to make suitable provision for members suffering by accidents which are not fatal, to render assistance to all members who are unable to follow any employment from old age or infirmity, and over sixty years of age, and also for the payment of a sum at the death of a member;" also (rule 5) that all persons should be eligible as ordinary members "who are employed in coal or other mines, or at any kind of work necessary to the carrying on of such mines." Rule 15 required that there should always be six trustees of the society, in whom all moneys should be vested. Rule 17 required separate accounts to be kept of "all moneys received or paid on account of every particular fund or benefit assured by the society, distinct from all moneys received and paid on account of any other benefit or fund." Rule 24 provided that "all moneys received on account of contributions, donations, admissions, fines, or otherwise shall be applied towards carrying out the objects of the society according to the rules and tables thereof;" and rule 34 provided benefits for minor, permanent, or fatal accidents happening to a member in his ordinary employment "in connexion with the coal or other mine at which he is employed, unless such member shall have changed his employment."

The £2320 13*s.* 8*d.* was invested by the Plaintiff and his co-trustees in consols, and the dividends as they accrued were paid over to the trustees of the society.

The Plaintiff, who was the surviving trustee of the fund, was desirous of transferring it into the names of four of the trustees of the society, but the question having arisen whether he could do so without the sanction of the Court, he instituted this action

against the Defendant, *Hugh Lee Pattinson*, who was an original subscriber to the *Hartley Colliery Fund*, but had taken no part in the arrangement dealing with the surplus fund.

An order had been obtained under Order XVI., rule 9, authorizing the Defendant *Pattinson* to defend the action on behalf of all subscribers to the fund who had not assented to the manner in which the surplus had been dealt with. The Attorney-General was made a co-Defendant on behalf of the Crown.

The Plaintiff claimed a declaration that, having regard to the trusts upon which he held the £2320 13*s.* 8*d.* and the investments thereof, he might properly transfer the same to four of the trustees of the friendly society for the general purposes of the society; or, in the alternative, directions as to how the said trust property ought to be applied and dealt with; and, if necessary, administration of the trusts.

Sir *Arthur Watson*, Q.C., and *W. C. Druce*, for the Plaintiff:—

We ask either that the fund may be transferred to the friendly society for its general objects, or that it may be applied *cy-près* under a scheme to be sanctioned by the Court.

*B. J. Leverson*, for the Defendant *Pattinson*:—

The Court will only sanction a *cy-près* scheme where the fund is given to charity generally, not where it is given for a specific charitable purpose, as in the present instance: *Clark* v. *Taylor* (1). At all events I ask that this fund, which has been appropriated to the *South Durham* district, may not be dealt with without at the same time dealing with the several funds appropriated to the other districts. They should all be dealt with in the same manner.

*Stirling*, for *The Attorney-General*:—

This fund is undoubtedly dedicated to charitable purposes, and it cannot be handed over to another society or body of persons except for charitable purposes. The question is whether the *Northumberland, &c., Friendly Society*, which is established under the *Friendly Societies Acts*, is really in law a charity. It has been

(1) 1 Drew. 642.

V.-C. B. 1886 PEASE v. PATTINSON.

distinctly laid down by Vice-Chancellor *Hall* in *In re Clark's Trust* (1) that a friendly society is not a charitable institution, and that, therefore, a gift to it cannot on its ceasing to exist be applied under the *cy-près* doctrine to general charitable purposes.

[BACON, V.C.:—In that case the gift was to a particular society which afterwards ceased to have any existence. It was the case of an ordinary lapsed legacy, where the legatee has died in the testator's lifetime.]

The particular ground of the decision was this, that in the case of a "charity" poverty was an essential condition to entitle a person to relief, but that in a friendly society poverty was not required to entitle a member to an allowance. Had the object of the gift been a charity the gift would have been applicable *cy-près*.

[BACON, V.C.:—Why may not a friendly society be a charity? The object of charity is to relieve distress. Poverty is not a necessary element to entitle a person to receive a charitable donation. Part of the funds of this society consists of "donations."]

Donations for the objects of the society. The relief of distress in any form is, no doubt, a charitable object, but in this society the circumstance entitling a member to payment out of its funds is not distress in the ordinary sense, but the occurrence of a certain event, namely, an accident. In *Spiller* v. *Maude* (2)

(1) 1 Ch. D. 497.

(2) Jessel, M.R., July 16, 1881.

SPILLER *v.* MAUDE.

[1864. S. 22.]

IN the year 1815 a society called the *York Theatrical Fund Society* was instituted in *York* by the voluntary association and subscriptions of the members of the *York* company of actors and actresses, and the fund so subscribed was vested in trustees and was from time to time augmented by the subscriptions of members and the donations of persons not members. The rules and regulations establishing the fund declared that it was solely for the benefit of the *York* company, and that no person could be admitted a member of the institution but an actual performer on the stage. They provided for an allowance for the funeral expenses of any contributor dying in indigent circumstances; for the relief of orphan children of contributors; for the supply of medical advice and medicines to sick contributors unable to pay; and for granting annuities to contributors on becoming incapacitated either by age, accident, or other infirmity, from exercising the duties of his

*Jessel*, M.R., held a friendly society called the *York Theatrical Fund Society* to be a charity; but on the ground that, according

---

or her profession as an actor or actress and not possessing an independent income of more than £50 per annum.

By a deed of declaration of trust dated in 1825 it was declared that the trustees of the society should stand possessed of the then existing and future trust fund upon the trusts and for the purposes expressed in the rules.

In 1832 the society was enrolled under the *Friendly Societies Act*, 10 Geo. 4, c. 56. *W. M. Maude*, the surviving trustee of the fund, died in 1863, having by his will appointed the Defendants his executors, and by a codicil, so far as he lawfully might, he directed his executors, "in case the objects of the said charity should fail," to pay the said fund in equal shares to the treasurers of the *York County Hospital*, the *General Infirmary* at *Leeds*, and the *General Infirmary* at *Hull*. In 1864 the Plaintiff became the sole surviving member of the society, and as such entitled to the whole income of the trust fund, which then amounted to about £1300 New £3 per Cent. Annuities. She however claimed to be absolutely entitled to the principal of the fund, and instituted this suit against *W. M. Maude's* executors for the purpose of enforcing her claim. At the hearing on the 11th of November, 1864, Lord *Romilly*, M.R., decided against her claim, but ordered the fund to be paid into Court and the income to be paid to the Plaintiff during her life. The facts of the case, especially the rules of the society, are more fully stated in the reports of the hearing of the cause before Lord *Romilly* (5 N. R. 30; 13 W. R. 69; 10 Jur. (N.S.) 1089; 11 L. T. (N.S.) 329). In pursuance of the decree the fund was paid into Court. In 1880 the Plaintiff died, and a petition was now presented by the surviving Defendant, asking (1) that the fund might be sold, and that if it should be held that the fund was a charitable fund, or was undisposed of, the same might be paid to the petitioner to be applied in accordance with the directions in the codicil to *W. M. Maude's* will, or that it might be paid to the treasurer of the *Royal General Theatrical Fund Association*.

It appeared that the *Royal General Theatrical Fund Association* had been incorporated by Royal Charter in 1853. Its funds were raised by the subscriptions of members and by donations from the general public. The objects, as stated in the rules, was to make provision, by way of annuity, for aged and decayed members who should become incapacitated by accident or infirmity from exercising his or her duties as an actor or actress, singer or dancer, and who should not possess an independent income beyond a certain amount; and also to make provision for the funeral expenses of members. It was said that this association was the only charity existing for indigent members of the theatrical profession.

*Maude*, for the petitioner, submitted that if the money could not be laid out according to the codicil, it should be paid to the treasurer of the *Royal General Theatrical Fund Association*.

*Stirling*, for the Attorney-General, submitted that this was a charitable trust which had failed, and that the money should be paid to the association.

*Marten*, Q.C., for the Plaintiff's legal personal representatives, claimed to be

V.-C. B. 1886 PEASE v. PATTINSON.

to the rules, poverty was a necessary element to entitle a member to the benefits of the society.

The question in the present case is whether membership of this society amounts to more than an insurance contract by which, on payment of a certain sum of money, a person coming under certain conditions is entitled to receive money out of the society's funds according to the rules. The proposed so-called "charitable objects" include other relief than that on account of colliery accidents, and are therefore wider than those contemplated by the subscribers to the *Hartley Colliery Fund:* there is no evidence to shew that the objects for which that fund was expressly subscribed have failed. At all events, if the fund in question is handed over to this society, directions should be given for setting it apart, either by alteration of the rules or otherwise, for the particular purpose for which it was subscribed, namely, relief against colliery accidents within the district to which it was appropriated.

Another question is, whether the consent of the Charity Commissioners should not have been obtained to this action under sect. 17 of the *Charitable Trusts Act*, 1853. Possibly the *Hartley Colliery Fund* is unaffected by the Act, sect. 62 of which exempts from its operation any institution, establishment, or society for charitable purposes "wholly maintained by voluntary contributions."

---

entitled to so much of the fund as had been subscribed by members of the society. He cited *In re Clark's Trust* (1 Ch. D. 497).

JESSEL, M.R., having gone through the rules of the society, came to the conclusion that the whole fund was charitable, but that the particular charity had failed. He thought that poverty was clearly an ingredient in the qualification of members who were to receive the benefits of the society. He also held that the playbill referred to in the reports of the case at the hearing shewed that the fund was to be kept up in perpetuity, and that no distinction could be drawn between that portion of it which arose from voluntary subscriptions and that portion which arose from the contributions of members, but that the whole was dedicated to charitable purposes and was applicable *cy-près*. He therefore ordered the costs as between solicitor and client of all parties appearing on the petition to be paid out of the fund and the surplus to be paid to the treasurer of the *Royal General Theatrical Fund Association* to be applied for the purposes of the association.

Solicitors: *T. W. Nelson; Hare & Co.; Bell, Brodrick, & Gray.*

BACON, V.C.:—

Upon the whole I am satisfied that this is a charity, and further, I think it is a charity which does not require the presence of or notice to the Charity Commissioners.

The application of the fund, however, presents considerable difficulty; and it is my duty, having decided that this is a charity, to see that the funds are not applied otherwise than in accordance with the charitable purposes contemplated by the original subscribers. In my opinion this is not a case for the application of the *cy-près* doctrine.

After some discussion,

HIS LORDSHIP pronounced judgment, ordering the Plaintiff to transfer the fund to four of the present trustees of the *Northumberland Society*, naming them, to be applied by them in accordance with the rules of the society for the relief of suffering occasioned by colliery accidents in the *South Durham* district in the way which might appear most desirable, and for no other purpose. The usual affidavits of fitness of the trustees and their consent to act to be filed. The costs of all parties, as between solicitor and client, to be paid out of the fund. Liberty to apply in Chambers for the appointment of new trustees when necessary, and also generally.

Solicitors: *Crossman, Crossman, & Prichard*, agents for *Philipson, Cooper, & Goodger, Newcastle-upon-Tyne; Hare & Co.*

G. I. F. C.

V.-C. B.

1886

Feb. 20.

## *In re* EARL OF AYLESFORD'S SETTLED ESTATES.

*Settled Estate—Settled Land, Proceedings for Protection of—Parliamentary Proceedings—Costs—Title of Dignity or Honour—Earldom—Incorporeal Hereditament—"Land"—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 10, *cl.* 1; *s.* 36.

Proceedings successfully prosecuted before the House of Lords Committee for Privileges to establish a claim to an Earldom, the consequences of which was that the Petitioner afterwards recovered estates which were subject to similar limitations, *held* to be "proceedings taken for the protection of settled land," the costs of which the Court directed to be paid out of property subject to the settlement, under sect. 36 of the *Settled Land Act*, 1882.

Form of order.

*In re Sir J. Rivett-Carnac's Will* (1) considered.

ADJOURNED SUMMONS.

Under a settlement dated the 3rd of January, 1871, the *Aylesford* estates in the counties of *Warwick* and *Kent* stood limited to the use of the seventh Earl of *Aylesford* for life, with remainder to the use of his first and other sons in tail male, with remainder to the use of his next eldest brother the Hon. *Charles Wightwick Finch* for life, with remainder to the use of his first and other sons in tail male, with remainders over.

On the 13th of January, 1885, the seventh Earl died, and a claim to the Earldom and estates was then made by his widow on behalf of an infant, *Guy Bertrand*, alleged to be his son.

The Hon. *C. W. Finch* then took steps, by petition, before the House of Lords Committee for Privileges to establish his claim to the Earldom.

Pending that litigation, an order was made by the Vice-Chancellor on the 6th of May, 1885, upon the application of the trustees of the settlement, in an action of *In re Earl of Aylesford's Family Settlement, Poulett* v. *Finch* (1885 A. 356), that the Plaintiffs, the trustees, might be at liberty to remain in possession of and manage the settled estates without prejudice to any question, until further order, and to pay into Court the net balances of

(1) 30 Ch. D. 136.

rents from time to time received by them since the death of the seventh Earl; and that they should render accounts of the rents so received to the person ultimately entitled to the estates; with liberty to apply.

The proceedings before the Committee for Privileges resulted in a resolution being passed by the Committee that the Hon. *C. W. Finch* had made out his claim to the Earldom (1), and he accordingly took his seat in the House of Lords as the eighth Earl of *Aylesford* on the 24th of July, 1885.

As a result of these proceedings the Vice-Chancellor, on the 12th of August, 1885, upon motion by the Defendant, the eighth Earl, made an order in the action that the Plaintiffs, the trustees of the settlement, should deliver up possession of the estates to the said Defendant, and under that order the eighth Earl was let into possession accordingly, so that in fact he recovered the settled estates with no other evidence than the finding of the Committee of Privileges. He then took out the present summons under the *Settled Land Act*, 1882, asking that the proceedings taken by him before the House of Lords and Committee for Privileges for establishing his claim to the Earldom might be approved as "proceedings taken for the protection of the settled land" which under the above-mentioned settlement stood settled in such manner that it would devolve in the same way as the Earldom; and that directions might be given that the costs, charges, and expenses incurred by the applicant in relation to such proceedings should be taxed as between solicitor and client, and that the trustees of the settlement should pay the amount thereof, as so taxed, to the applicant out of any money in their hands, or the first money which might come to their hands, being respectively capital money arising under the said Act in respect of such settled land: and that in the meantime, until such payment, the amount of such costs, charges, and expenses, as so taxed, should be a charge in favour of the applicant on such settled land: and that the costs, charges, and expenses of the applicant and of the Respondents, the trustees of the settlement, of the present application and consequent thereon might be taxed as between solicitor and client, and retained and paid by the

(1) *The Aylesford Peerage*, 11 App. Cas. 1.

V.-C. B. 1886

*In re* EARL OF AYLESFORD'S SETTLED ESTATES.

trustees out of any capital money in their hands, or which might come to their hands, in respect of the said settled land.

*Millar*, Q.C., and *W. C. Druce*, for the Applicant:—

This application is made under sect. 36 of the *Settled Land Act*, 1882, which enacts that, "the Court may, if it thinks fit, approve of any action, defence, petition to Parliament, parliamentary opposition, or other proceeding taken or proposed to be taken for protection of settled land, or of any action or proceeding taken or proposed to be taken for recovery of land being or alleged to be subject to a settlement, and may direct that any costs, charges, or expenses incurred or to be incurred in relation thereto, or any part thereof, be paid out of property subject to the settlement." In the present case the proceedings in Parliament are expressly within that section, for they were, in effect, for the purpose of protecting the settled estates from the claim made by the infant, *Guy Bertrand*, to both the Earldom and the estates. But the word "land" in sect. 36 includes, under the interpretation clause, sect. 2, sub-sect. 10 (cl. 1), "incorporeal hereditaments," and Mr. Justice *Chitty* has recently held, in *In re Sir J. Rivett-Carnac's Will* (1), a case arising under sect. 37, in which the same word "land" occurs, that a dignity or title of honour, such as a baronetcy, being an incorporeal hereditament, is "land" within the meaning of the Act. We submit, therefore, that an Earldom falls within sect. 36, and that both the dignity and the estates have clearly been "protected" by the proceedings in Parliament; and we ask your Lordship to say that they were properly taken in the interest, not only of the present Earl, but also of his children, and therefore that the expense of those proceedings should be allowed under the section. The summons appears to be in proper form.

*Maclean*, for Lord *Guernsey*, the infant son of the Applicant.

*Dauney*, for the trustees of the settlement:—

Had proceedings been taken by way of ejectment to recover the estates, it would still have been necessary to take proceedings before the Committee for Privileges to establish the claim to the

(1) 30 Ch. D. 136.

title; practically, therefore, an expensive litigation to recover the estates has been avoided.

BACON, V.C.:—

It appears to me clear, upon the construction of this Act of Parliament, that the proceedings which have been taken were for the protection of the land.

Of course I should have been greatly fortified, if I entertained any doubt upon the point, by the recent decision of Mr. Justice *Chitty;* but, in my opinion, it is plain and clear, and is a just construction of the Act, that the land ought to bear the expenses of the proceedings which have been taken, the result of which was for the protection of the land.

I find no difficulty, therefore, in making an order in the terms of the summons, which appears to me to be proper in point of form, and the costs there mentioned will include the costs of all parties of the present application.

Solicitors: *Bennett, Dawson, & Bennett; F. Lovell Keays.*

G. I. F. C.

---



## *In re* VERNON, EWENS, & CO.

*Trustee and Cestui que Trust—Solicitor and Client—Declaration of Trust—Evidence—Account Books—Letters—Mortgage—Priority—Fraud—Negligence—Purchase for Value without Notice.*

A client left moneys for investment in the hands of his solicitor. The solicitor represented that they were invested on a mortgage to *A.*, and the client made no further inquiry. The solicitor, in fact, was the holder of a mortgage for a larger amount on property of *A.*, as to part of which the legal estate was outstanding. He afterwards sold the property to a company:—

*Held*, as to that part of the property in which the legal estate was outstanding, that there was no negligence to postpone the client, and that he had priority over the claim of the company.

*H.*, who employed Messrs. *P.* as his solicitors, was in the habit of leaving moneys of his in their hands for investment for his benefit. In 1878, Messrs. *P.*, who had lent money of their own to *V. & E.*, an engineering firm, on a mortgage of their works at *Cheltenham*, repaid themselves £11,000, part of the debt, out of moneys of *H.* in their hands and in their

V.-C. B.

1886

*In re* VERNON, EWENS, & CO.

books entered the transaction as a "loan" by *H.* to *V. & E.* of £11,000 at 5 per cent., the interest being paid to him during his life by Messrs. *P.*

In 1879 *H.* died intestate, and Messrs. *P.* then continued to act as solicitors to his administratrix. In 1881, *V. & E.* bought additional property at *Cheltenham* for their works, and executed a mortgage of that property in fee for £750, which mortgage subsequently became vested in the *Worcester Bank*. In 1882, *D.* became a partner in the firm of *V. & E.*, *D.* purchasing and taking a conveyance of all the partnership property, and undertaking to pay the partnership debts. *D.* thereupon granted a lease of the property to the firm. Shortly afterwards *D.* mortgaged the property to Messrs. *P.* for £50,000 and interest, reserving power to create a charge in priority to that mortgage. Under that power *D.* charged the property with £8000 in favour of the *Worcester Bank*, who thus became entitled to a prior charge for £8750 on the whole property. *D.* then retired from his partnership with *V. & E.*, and in February, 1883, conveyed the equity of redemption in the property to Messrs. *P.*

In July, 1883, the firm of *V. & E.* was, through Messrs. *P.'s* instrumentality, converted into a limited company, and in December, 1883, the firm joined with Messrs. *P.* in conveying the property and goodwill of the firm to the company, subject to the mortgage to the *Worcester Bank*, in consideration of paid-up shares allotted to Messrs. *P.*, and to *V. & E.*, who thus became substantially the only shareholders in the company. The legal estate was then outstanding in the bank as to that part of the property which was comprised in their mortgage for £750.

Early in 1884 Messrs. *P.* absconded, and in March, 1884, they were adjudicated bankrupts. Neither *H.* nor his administratrix had any knowledge of the transactions entered into by Messrs. *P.* In June, 1884, the company was ordered to be wound up. A summons was then taken out by *H.'s* administratrix, in the winding-up, claiming (1) that, subject to the bank's mortgage, she became, under "declarations of trust" by Messrs. *P.*, sub-mortgagee for £11,000 and interest, or part owner to that extent, of the £50,000 mortgage to Messrs. *P.*; (2) priority over the company; and (3) that, subject to the bank's mortgage, the securities might be marshalled. Messrs. *P.* were not represented on the summons, but an order had been made by *Cave*, J., in their bankruptcy, on the application of *H.'s* administratrix (the company not being a party), declaring that, as against the trustees in the bankruptcy, £11,000, part of the £50,000 mortgage, formed part of *H.'s* estate, and that the applicant was entitled to stand as first mortgagee of the mortgaged premises for the £11,000.

As evidence in support of the summons the claimant relied on the above-mentioned entry in Messrs. *P.'s* books; on entries in a cash account furnished to her by them of half-yearly payments of interest on the £11,000; on a tabular statement of "mortgages" in the residuary account of *H.'s* estate prepared by them in 1880 on her behalf for the Legacy Duty Office, one of the items being expressed to be a mortgage on "*V. & E.'s* property at *Cheltenham* for £11,000 at 5 per cent."; and on a letter written in 1883 by Messrs. *P.* to her, containing a similar tabulated statement of "mortgages" forming part of *H.'s* estate:—

*Held*, that, although the entries, &c., so relied on were not evidence as

against third parties such as the company, yet as against Messrs. *P.* they established a declaration of trust of a mortgage for £11,000 and interest extending to all the property at *Cheltenham* belonging to *V. & E.* at the date of the letter of 1883, and not merely to their property as existing in 1878; that no negligence was to be imputed to *H.*, or his administratrix for not requiring from Messrs. *P.*, their solicitors, proper evidence of the mortgage: and that the company had failed to make out any case of purchase for value without notice.

Order made according to summons.

## ADJOURNED SUMMONS.

*William Lamplugh Hervey*, a client of Messrs. *Frederick Searle Parker* and *William Searle Parker*, a firm of solicitors in *Bedford Row, London*, had been in the habit of allowing them to hold large sums of money of his in their hands for investment on mortgage and other securities, for his benefit.

In 1876, Messrs. *Thomas Vernon & Paul Ewens*, a firm of engineers and ironfounders at *Alstone* near *Cheltenham*, were carrying on their business upon foundry works comprising at that time only one acre of freehold ground adjoining the *Midland Railway*.

From 1876 and onwards they were generally financed in their business by the *Parkers*.

On the 6th of January, 1877, *Vernon & Ewens* mortgaged their one acre of freehold to the *Parkers* in fee to secure £1550, and on the 1st of August, 1877, by an indenture reciting the first mortgage, they further mortgaged the one acre and the buildings, machinery, and plant thereon, to the *Parkers*, to secure £20,000 and interest, the principal sum including the £1550 due on the original mortgage.

By an indenture of the 14th of October, 1878, *Vernon & Ewens* further charged the same property in favour of the *Parkers* with £35,000 and interest, thus making the total mortgage debt £55,000 and interest.

On the 31st of December, 1878, the *Parkers*, out of moneys of *Hervey* in their hands, repaid themselves £11,000 of the amount due to them from *Vernon & Ewens*, and in their books, as the evidence shewed, entered the transaction as a "loan" by *Hervey* to *Vernon & Ewens* of £11,000 at 5 per cent., the interest being paid by the *Parkers* to *Hervey* during his life.

V.-C. B.
1886
*In re* VERNON, EWENS, & CO.

On the 11th of January, 1879, *Vernon & Ewens* took a lease for twenty-one years of a plot of land containing 1A. 0R. 31P., adjoining their then existing works.

On the 19th of July, 1879, *Hervey* died, whereupon his sister, Mrs. *Mary Sarah Parratt*, took out administration to his estate. The *Parkers* continued to act as her solicitors, and prepared the residuary account of the estate for the Legacy Duty Office.

On the 31st of December, 1881, Messrs. *Payne & Brown* conveyed to *Vernon & Ewens* in fee a plot of freehold land containing 3A. 0R. 8P., adjoining their works; and by a deed of the 2nd of January, 1882, *Vernon & Ewens* conveyed the legal estate in the same plot to *Payne & Brown* in fee by way of mortgage to secure £750 and interest. By a deed of the 31st of March, 1884, the mortgage debt and security were transferred to the *Worcester City and County Banking Company, Limited*, hereinafter referred to as "the *Worcester Bank*."

In October, 1882, an arrangement was made between one *Davis* and *Vernon & Ewens* that *Davis* should purchase the freehold and leasehold lands and works belonging to *Vernon & Ewens*, and then join them in partnership, granting them a lease of the works and lands for the purpose of carrying on the business.

This arrangement was negotiated by the *Parkers*, they agreeing to transfer their charge upon the premises to *Davis*. Accordingly, on the 9th of October, 1882, *Vernon & Ewens* sold and conveyed the above-mentioned freehold and leasehold land and works to *Davis* in consideration of £70,100 and an undertaking by *Davis* to pay the debts of the partnership. On the following day a partnership was formed between *Vernon, Ewens, & Davis*, for carrying on the works under the firm of "*Vernon, Ewens, & Co.*," and *Davis* thereupon granted a lease from year to year of the works to the new firm at a rent of £3000 per annum.

By an indenture dated the 12th of October, 1882, and made between *Davis* of the one part and the *Parkers* of the other part, after reciting that *Davis* was seised in fee, free from incumbrances, of the one acre and the buildings, plant, and machinery thereon; and that he was seised in fee of the 3A. 0R. 8P. subject only to the mortgage of the 2nd of January, 1882, to *Payne & Brown* for £750 and interest; and that he was entitled as

assignee, free from incumbrances, of the leasehold 1A. 0R. 31P.: It was witnessed that *Davis* conveyed the freehold one acre and the buildings, plant, and machinery thereon, and the freehold 3A. 0R. 8P. (subject as to the latter to the said mortgage) to the use of the *Parkers* in fee by way of mortgage for securing the repayment to them of the sum of £50,000 with interest thereon at £6 per cent. per annum. And, as further security, *Davis* thereby demised the leasehold 1A. 0R. 31P. to the *Parkers* for the residue of the term of twenty-one years, except the last day thereof: And a power was thereby reserved to *Davis* to mortgage or charge all or any part of the said premises as security for any sum not exceeding £20,000, such mortgage or charge to have priority over the present mortgage. On the 20th of November, 1882, *Davis*, in pursuance of that power, "charged" the same premises by deed with £8000 and interest in favour of the *Worcester Bank*. Shortly afterwards *Davis* retired from the partnership.

By an indenture dated the 7th of February, 1883, *Davis*, in consideration of the release thereinafter mentioned, and of a covenant by the *Parkers* to pay the mortgage debt of £8000 and interest to the *Worcester Bank*, conveyed the whole of the freehold and leasehold lands and the works to the *Parkers*, free from this provision for redemption, but subject to the said £8000 and interest, and to the lease to *Vernon, Ewens, & Co.*; and the *Parkers* thereby released *Davis* from the mortgage debt of £50,000 and interest.

On the 19th of July, 1883, as the result of a reconstruction scheme arranged by the *Parkers*, the partnership firm of *Vernon, Ewens, & Co.* was registered under the *Companies Acts*, 1862, to 1880, as a limited company, under the name of "*Vernon, Ewens, & Co., Limited*," with a nominal capital of £100,000 in £10 shares, the memorandum of association being subscribed by seven persons for one share each. The articles appointed Mr. *Hugh Mewburn Walker* as the first solicitor to the company.

By an indenture dated the 10th of December, 1883, and made between the *Parkers* of the first part, *Vernon & Ewens* of the second part, and the new company of the third part, after reciting the mortgage by *Davis* to the *Parkers* of the 12th of October,

V.-C. B.
1886
*In re* VERNON, EWENS, & Co.

1882, for £50,000, the charge by *Davis* of the 20th of November, 1882, to the *Worcester Bank*, for £8000, and the conveyance to the *Parkers* of the 7th of February, 1883, subject to the said charge of £8000 and to the tenancy of the firm of *Vernon, Ewens, & Co.*: and also reciting that *Vernon & Ewens* had for some time past carried on business as engineers, ironfounders, and contractors upon the freehold and leasehold hereditaments thereinafter assured, and were entitled to the plant, machinery, &c., upon the same and to the goodwill of the business: that the company was formed and registered as a company limited by shares, in July, 1883, for the purpose (among other things) of acquiring and working the said business: that the *Parkers* had agreed to sell to the company the freehold and leasehold premises, and the plant, machinery, chattels, and goodwill thereinafter assured, and the benefit of the business contracts, subject to the payment by the company of the debts and liabilities of the business, for £50,000 payable to the *Parkers*, and £20,000 payable to *Vernon & Ewens:* and that "on the treaty for the said sale it was agreed that the said sum of £50,000 should be satisfied by the allotment to the said *F. S. Parker* and *W. S. Parker*, as fully paid, of 5000 ordinary shares of £10 each in the company, and that the further sum of £20,000 should be satisfied by the allotment to the said *T. Vernon & P. Ewens*, as fully paid, of 2000 deferred shares of £10 each in the company;" and it was also agreed that the company should, as part of the consideration for the said sale, "enter into such covenants as are hereinafter contained;" and also reciting that in pursuance of the said agreement the shares in the company had been allotted to the *Parkers* and to *Vernon & Ewens:* It was witnessed that the *Parkers* and *Vernon & Ewens*, as beneficial owners, conveyed to the company the freehold plot of 3A. 0R. 8P., the original freehold plot of one acre, the machinery, and the goodwill of the business, to hold, as to the freeholds, to the use of the company in fee simple, subject to the mortgage to the *Worcester Bank*, and, as to the machinery and goodwill, to the company absolutely. And it was further witnessed that the *Parkers* and *Vernon & Ewens* assigned to the company the leasehold plot of 1A. 0R. 31P. for the residue of the

term of twenty-one years. And the company thereby covenanted with *Vernon & Ewens* to discharge all the liabilities of the business and to indemnify them against the same.

On the following day the company conveyed the same premises to trustees to secure payment of debentures intended to be issued by the company.

Early in the year 1884 the *Parkers* absconded, and on the 20th of March, 1884, they were adjudicated bankrupts.

On the 30th of June, 1884, an order for winding up the company was made.

By an order of the Court of Bankruptcy, made in the matter of the *Parkers'* bankruptcy on the 26th of March, 1885, by Mr. Justice *Cave*, upon the application of Mrs. *Parratt*—to which, however, the company was not a party—it was declared that, as against the trustees in the bankruptcy, the sum of £11,000, part of the £50,000 secured to the bankrupts by the mortgage of the 12th of October, 1882, upon the freehold and leasehold property and works at *Alstone*, together with a proportionate part of the interest thereon, formed part of the moneys and personal estate of the said *W. L. Hervey*, deceased, and that the lands, works, and premises comprised in the said mortgage, upon the purchase thereof by the bankrupts, and upon the conveyance thereof to them, and the 5000 fully paid-up shares in the company allotted to the bankrupts as consideration for the re-sale to the company, as between the bankrupts and Mrs. *Parratt* remained and were subject to and charged with the payment to her of the said £11,000 and interest thereon at 5 per cent. per annum; and that as such administratrix as aforesaid she was entitled to stand as first mortgagee of the premises included in the mortgage of the 12th of October, 1882, and of the said 5000 shares, for securing payment to her as such administratrix of the said £11,000 and interest at 5 per cent. from the 31st of December, 1878, with mortgagee's costs; and the trustees were ordered to deliver up to the applicant or her solicitors the mortgage deed of the 12th of October, 1882, and the certificates of the 5000 shares, and all other deeds relating to the mortgaged premises. In pursuance of that order the deeds and share certificates were delivered to Mrs. *Parratt's* present solicitor.

V.-C. B. 1886 *In re* Vernon, Ewens, & Co.

As the result of an investigation of the deeds, Mrs. *Parratt*, on the 10th of August, 1885, took out the present summons in the winding-up of the company (the *Worcester Bank*, the first mortgagees, consenting to be bound by the order to be made thereon), asking (1) a declaration that, subject to the said first mortgage of the *Worcester Bank* for £750 and £8000 created by the said indentures of the 2nd of January, 1882, and 20th November, 1882, the applicant, as administratrix of the said *W. L. Hervey*, "under divers declarations of trust by the said *F. S. & W. S. Parker*, became sub-mortgagee for £11,000 and interest, or part owner to that extent, of the security of the said *F. S. & W. S. Parker*, for £50,000 created by the mortgage of the lands and works dated the 12th of October, 1882;" (2) that as to the 3A. 0R. 8P. included in the mortgage of the 2nd of January, 1882, "the legal estate wherein was outstanding when *F. S. & W. S. Parker* conveyed the said land and works to the said company, retained and still has priority over any estate or interest of the liquidating company;" (3) that the value of the said freehold and leasehold land and works might be valued separately, and that the works might be sold and the securities thereon marshalled, and that after payment to the *Worcester Bank* of the £8750 and interest due to them, the surplus proceeds of sale, as between the applicant and the company, might be divided as if the £750 and interest had been paid exclusively from proceeds of the 3A. 0R. 8P. and the £8000 and interest had been paid out of the proceeds of the whole of the land and works rateably according to the value of each of the several pieces of freehold and leasehold land forming the works, and that the surplus proceeds of the 3A. 0R. 8P. might be paid to the applicant in part discharge of the said mortgage debts. The summons was served upon the official liquidator of the company and upon the *Worcester Bank*.

The questions arising on the summons were, (1) whether the evidence was sufficient to establish as against the *Parkers* and in favour of *Hervey*, and afterwards of the applicant as his administratrix, a declaration of trust in respect of the £11,000 and interest; (2) whether, if such declaration of trust was established, the £11,000 formed part of the mortgage debt of £50,000 secured to the *Parkers* by the mortgage of the 12th of October, 1882, and

(3) whether, even assuming such trust or mortgage to be established, the company were not, under the conveyance of the 10th of December, 1883, in the position of purchasers for valuable consideration without notice of any such trust or mortgage, and therefore entitled to hold the property so conveyed to them free from any liability in respect thereof.

In support of the summons a joint affidavit was filed by Mrs. *Parratt* and her present solicitor, Mr. *Ward*, who, after deposing to the various transactions above mentioned, relied upon the following entries and documents as evidence that the *Parkers* were mortgagees in trust, first for *Hervey*, and after his death, for Mrs. *Parratt*, to the extent of £11,000 and interest.

The "loan" by *Hervey* to *Vernon & Ewens* was entered in the name of "*W. L. Hervey*," in the *Parkers*' ledger thus:—"Dr. 1878, Dec. 31st. To cash to Messrs. *Vernon & Ewens* on loan at 5%, £11,000." Also an extract from cash account furnished by the *Parkers* to Mrs. *Parratt* as *Hervey's* administratrix, contained entries from the 31st of December, 1879, to the 1st of July, 1883, both inclusive, of the half-yearly payments of interest due "on £11,000 due from Messrs. *Vernon & Ewens*." The *Parkers*' books further shewed that they paid *Hervey* the interest on the £11,000 up to his death, the last payment made to him being on the 20th of June, 1879, about a month before his death.

The statement of *Hervey's* residuary estate account for the Legacy Duty Office was prepared by the *Parkers* as Mrs. *Parratt's* solicitors, and was duly passed by them on the 9th of July, 1880, she having signed it on that day. In the schedule of "mortgages and interest due at the death," was the following entry:—

| No. | Mortgagors' Names. | Premises. | Amount of Principal. | Rate of Interest. | Amount of Interest due at the Death. |
|---|---|---|---|---|---|
| | | | £ | | £ s. d. |
| 8 | *Vernon & Ewens.* | Freehold property at *Cheltenham.* | 11,000 | 5 | 13 5 6 |

Mrs. *Parratt* further stated that notwithstanding the alleged release of the mortgage debt of £50,000 by the deed of the 7th of February, 1883, of which she knew nothing, the *Parkers*

V.-C. B. 1886 *In re* VERNON, EWENS, & Co.

continued to represent and declare to her, both verbally and in writing, that the £11,000 with interest at 5 per cent. per annum was secured by mortgage of *Vernon & Ewens'* works at *Cheltenham*. On the 12th of May, 1883, *W. S. Parker* wrote her a letter respecting the division of her brother's estate, in which he said, "the estate consists of the following mortgages." Then followed a tabular statement of them, one item of which ran thus :—

| No. | Mortgagors' Names. | Premises. | Amount of Principal. | Rate of Interest. |
|---|---|---|---|---|
| 8 | *Vernon & Ewens.* | Freehold property, works and premises at *Cheltenham.* | £ 11,000 | 5 |

The letter, which was of great length, then went on to make suggestions as to the best mode of dividing the estate and apportioning the various securities. It recommended that certain "securities," including "*Vernon & Ewens'* mortgage for £11,000," should not at present be called in; and it contained the following passage :—"The question of these mortgages is really what puzzles us. At the time the money was lent by your brother the properties were, each of them, of very much greater value than the sums that were lent; and the fall in their value is simply owing to the depression in trade, and the several bad agricultural years there have been." The affidavit then went on to state that at the date of the letter the legal estate in the 3A. 0R. 8P. was outstanding in *Payne & Brown*, the mortgagees under the indenture of the 2nd of January, 1882, and the legal estate in the original one acre of freehold and the 1A. 0R. 31P. of leasehold was vested in the *Parkers* subject to the claim of the *Worcester Bank*: that the 3A. 0R. 8P. formed the most valuable part of the works, being traversed by a railway communicating with the *Midland Railway*: that, according to Mrs. *Parratt's* information and belief, the company was promoted and formed by the *Parkers*, although they caused another solicitor to be formally appointed as nominal solicitor to the company, and that the directors, or some of them, had notice of her interest at the date of the conveyance to the company of the 10th of December, 1883: also that she was no

party to and was entirely ignorant of the various transactions which led to the property being vested in the company: that as the result of Mr. *Ward's* inquiries into the matter, the company was never established, and no shares were ever issued except to the *Parkers* and to *Vernon & Ewens*, and that such shares were issued to them only as the consideration money upon the conveyance of the works to the company.

Mrs. *Parratt* submitted that the said entries, declarations, and letters by the *Parkers* were declarations of trust in her favour of the mortgages and conveyances to them, and that under them she, as her brother's administratrix, became entitled to an equitable interest in the above-mentioned land and works as mortgagee for £11,000 and interest: and as to the 3A. 0R. 8P., the legal estate wherein was outstanding since the 2nd of January, 1882, she further submitted that, subject to the mortgage for £750 and any right of the *Worcester Bank* to tack their £8000 charge, and whether *Vernon, Ewens, & Co.*, had notice of her interest or not, she retained her priority as an incumbrancer over that company.

As to the remaining portion of the lands and works, Mrs. *Parratt* submitted that the company had no actual capital, and were not purchasers for value, and ought to be postponed to her: but that, if the company ought not to be postponed to her, then, as to the remaining portion of the said land and works, the 3A. 0R. 8P. and the remaining portion of the land and works ought to be valued and sold, and the securities marshalled as asked by the summons.

Upon the question of notice to the company, *Thomas Haig Smellie*, a subscriber of one share to the company's memorandum of association, and one of the directors named in the articles, deposed that he had never received any notice, nor had any knowledge of any sub-mortgage of or charge upon the £50,000 mortgage to the *Parkers* (subject to which the company acquired their property) to or in favour of *Hervey* or Mrs. *Parratt*, or that such mortgage belonged to any person other than the *Parkers:* that the *Parkers* did not act as solicitors to the company in the purchase of the property, but that the company was separately represented by Mr. *Hugh Mewburn Walker*, the solicitor appointed

V.-C. B. 1886 *In re* VERNON, EWENS, & Co.

by the articles; and that it was not true that he was merely nominally the solicitor in the matter. *Smellie's* statements were corroborated by *Claude Monckton*, who was another subscriber of one share to the memorandum, and had acted as secretary to the company from the 19th of July, 1883, to the 4th of June, 1884, the date of the winding-up order: by *Thomas Vernon*, one of the partners in the late firm of *Vernon & Ewens*, and one of the managers of the company, who also deposed that the *Parkers* always led him to believe that the £50,000 was advanced out of their own moneys, and never mentioned the names of either *Hervey* or Mrs. *Parratt* as having advanced any portion thereof: and by *Flaxman Haydon*, the official liquidator of the company, who deposed that on the occasion of the purchase by the company the mortgage for £50,000 to the *Parkers* was paid off and satisfied by the allotment to them of 5000 fully paid-up shares, and that, so far as he knew from his position as liquidator, the company never received any notice nor had any knowledge of any sub-mortgage of or charge upon such mortgage.

The evidence in support of the present summons was substantially the same as that upon which Mr. Justice *Cave* made the order in the *Parkers'* bankruptcy.

In the course of the argument the Vice-Chancellor, at the request of the applicant's counsel, ordered the liquidator of the company to produce the company's books for inspection. It turned out, however, that the register of members and share ledger had been destroyed by an accidental fire at the liquidator's offices, but the minute book of directors' meetings and the share certificate book were produced. From these documents the only shares for which certificates appeared to have been issued were the 5000 fully paid-up "ordinary" shares to the *Parkers*, and the 2000 "deferred" shares to *Vernon & Ewens*. These purported to be issued by so-called "resolutions" passed at a meeting of "directors" held on the 13th of December, 1883, at which the *Parkers* were also present. There was nothing in the articles of association defining "deferred" shares or indicating what they meant; nor was there any resolution purporting to create new share capital of that class. It did not appear that anything had been paid on any shares up to the date of the winding-up. The

directors had been put on the list of contributories for the amount of their qualification shares.

V.-C. B.
1886
*In re* VERNON, EWENS, & Co

*Hemming*, Q.C., and *Stock*, for Mrs. *Parratt*:—

Our contention is that the £50,000 mortgage taken by the *Parkers* in their own name was in reality a contributory mortgage of which our £11,000 formed part: that the *Parkers* were trustees for us of that £11,000, and that in breach of their duty as such trustees they handed over the mortgaged property to the company without informing them of our mortgage. We say, therefore, that we have a right to follow our £11,000 into the hands of the company. The fact that the *Parkers* were trustees of the £11,000 for us is clearly established by their own admissions in their books, in the residuary account prepared by them, and in the letter of the 12th of May, 1883.

*Millar*, Q.C., and *Bramley*, for the official liquidator of the company:—

We object to the entries from the *Parkers*' books, the residuary account, and the letter as being read as evidence against us. They are documents as between a principal and his agent, and cannot affect third parties, such as ourselves, who had no notice of them.

*Marten*, Q.C., and *Maidlow*, for the *Worcester Bank*, took the same objection.

*Hemming*, Q.C., in answer to the objection:—

We have to shew that the *Parkers* were our trustees, and that there is nothing to displace our right as *cestuis que trust*. We submit we are entitled to read these documents as establishing a trust between us and the *Parkers*, and this is the only purpose for which we rely upon them. We do not say they affect third parties, but they clearly affect the *Parkers*, and tend to prove the trust. In the common case of a settlement and misappropriation of the trust funds, the settlement is evidence of the trust.

The affidavit of Mrs. *Parratt*, and her solicitor, Mr. *Ward*, proves documents establishing the trust, which are equivalent to

V.-C. B. 1886 *In re* Vernon, Ewens, & Co.

a settlement or a declaration of trust. Whether the company had notice of the trust or not, if the trust existed we are entitled to have the charge of the £11,000 carried into effect for our benefit.

Bacon, V.C., gave leave to read the entries, &c., in question, but said that they constituted no evidence whatever against the company unless it could be shewn that the company had notice of their contents.

*Hemming*, Q.C., and *Stock*, then proceeded with their argument on the summons:—

It is said that the company, when they purchased the property and allotted fully paid-up shares in discharge of the mortgage debt of £50,000, had no notice of our charge of £11,000, and are therefore under no liability in respect of it; but the company was a mere sham: none of its shares were ever paid for: the only shareholders were the *Parkers* and *Vernon & Ewens*, to whom fully paid-up shares were allotted as the consideration for the conveyance to the company; but they were the very parties who knew all about our charge. It is impossible, therefore, to contend that our charge is displaced on the ground of want of notice. But whether the company had notice or not is immaterial. The defence of purchase for value without notice has no application to a question of priorities between successive equitable interests. In such cases, and in the absence of conduct postponing the first incumbrancer (of which there is none here), the rule is *qui prior est tempore potior est jure*. The case is really covered by *Cory* v. *Eyre* (1), where the evidence establishing the trust was similar to that in the present case, the only difference being that in our case we have an informal declaration by letter communicated to the *cestui que trust*, while in that there was a formal declaration never communicated. There the mortgagee-trustee transferred his mortgage for value, and although the transferee took without notice of the trust, it was held that the *cestui que trust* was entitled in priority to the transferee.

Another similar case to the present is *Bradley* v. *Riches* (2),

(1) 1 D. J. & S. 149. (2) 9 Ch. D. 189.

where the trustee mortgaged the trust property to a bank, who had no notice of the trust; yet it was held that the *cestui que trust* had priority over the bank. There it was distinctly laid down (1), upon the authority of *Cory* v. *Eyre* (2) and *Shropshire Union Railways and Canal Company* v. *Reg.* (3), that in order to postpone a first mortgagee to the second, it is necessary to prove against the first either fraud, or gross negligence amounting to fraud; that it is no negligence on the part of the first mortgagee to take his security in the name of another person, it being the right of every man to take a security in the name of another; and that a man having done so could not have negligence imputed to him for not watching his trustee. The argument that a first mortgagee can have no relief against a second mortgagee having no notice of the first mortgage, on the ground that the second mortgagee is a purchaser for value without notice, is displaced by *Colyer* v. *Finch* (4). The result of the authorities is that the first mortgagee takes priority unless he can be fixed with fraud or negligence amounting to fraud, and that there is no such doctrine as that a *cestui que trust* may not leave the trust property in the hands of his trustee. Here there has been no negligence on the part of the *cestui que trust* beyond allowing the trust fund to remain in the hands of the solicitor-trustee, but the authorities shew that that is not sufficient to postpone the *cestui que trust.* We do not dispute the priority of the *Worcester Bank,* who have got the legal estate in the 3A. 0R. 8P., both for their original mortgage debt of £750, and their subsequent debt of £8000, which they were entitled to tack to the first. We ask for a marshalling order on the footing of the law laid down in *Barnes* v. *Racster* (5) and *Bugden* v. *Bignold* (6).

*Millar,* Q.C., and *Bramley,* for the official liquidator of *Vernon, Ewens, & Co., Limited:*—

There is no evidence of the company having bought with notice beyond the mere allegation of the applicant. We are, therefore, entitled to say that under the conveyance of the 10th of

(1) 9 Ch. D. 192.
(2) 1 D. J. & S. 149.
(3) Law Rep. 7 H. L. 496, 507.
(4) 19 Beav. 500; 5 H. L. C. 905.
(5) 1 Y. & C. Ch. 401.
(6) 2 Ibid. 377.

V.-C. B. 1886 *In re* Vernon, Ewens, & Co.

December, 1883, the company took without any notice of any sub-mortgage or charge in favour either of the applicant or of her intestate, *Hervey*. Again, the applicant has not the legal estate in any of the property she desires to affect, namely, the freehold one acre and 3A. 0R. 8P., and the leasehold 1A. 0R. 31P., for, as regards the 3A. 0R. 8P., the legal estate is in the *Worcester Bank*, and as regards the one acre and the leaseholds, it is in the company under the deed of the 10th of December, 1883.

In *Cory* v. *Eyre* (1) there was an express declaration of trust forming part and parcel of the original security, and it was held (2) that a declaration of trust vests an estate and interest in the subject-matter of the trust in the person in whose favour the trust is declared, and that such estate or interest cannot be displaced except on strong grounds; but we say that here there is no sufficient evidence of a declaration of trust. But even assuming there was a declaration of trust, it only applies to one part of the property in question. According to the accounts and correspondence as between the *Parkers* on the one hand, and *Hervey* and Mrs. *Parratt* on the other (but which we submit are not admissible in evidence as against us) the appropriation of the £11,000 by the *Parkers* took place on the 31st of December, 1878, and the accounts and correspondence refer to the appropriation at that date, and to a mortgage existing on the 19th of July, 1879, the date of *Hervey's* death, as security for the sum appropriated. They do not refer to any new property as coming into the mortgage since the death, and they mention the security as "freehold" only. The date of the death is therefore the period for ascertaining what "freehold" property, if any, was included in the mortgage for £11,000. Now at that date the 3A. 0R. 8P. had not been acquired either by the *Parkers* or by *Vernon & Ewens*. *Vernon & Ewens* did not acquire it until the 31st of December, 1881, two years and a half after *Hervey's* death, and the *Parkers* had no interest, either in that property or in the leaseholds, until the 12th of October, 1882, so that, whatever appropriation took place in December 1878, it did not apply to either of those two properties. Thus, whatever declaration of trust was made, it is clear there was no interest in the 3A. 0R. 8P. upon which the *Parkers* could give

(1) 1 D. J. & S. 149. (2) 1 D. J. & S. 167.

a charge in *Hervey's* lifetime, and accordingly Mrs. *Parratt* can have no possible interest in that property, upon which her summons mainly relies. Then, as to the one acre of freehold, it is clear that the legal estate in that, as well as in the leaseholds, is now vested in the company under the conveyance of the 10th of December, 1883; the result being that, as regards the only "freehold" property—that is, the one acre—to which Mrs. *Parratt's* claim can possibly refer, the company is in the position of a purchaser without notice and having the legal estate, and Mrs. *Parratt* is, as, in fact, stated in her summons, only a "sub-mortgagee" from the *Parkers*. The principle applicable to such cases as the present is that, "of two innocent parties, the principal or the *cestui que trust*, whose agent or trustee has committed the fraud, rather than the stranger who has dealt with the agent or trustee, must bear the loss": *Seton* on Decrees (1), citing *Hunter* v. *Walters* (2); *Pilcher* v. *Rawlins* (3).

Again, the rule is that, as between two innocent parties, the loss resulting from negligence that leads to fraud must fall upon the person through whose negligence the fraud was committed: *Waldron* v. *Sloper* (4). Here there was great negligence on the part of *Hervey* and his administratrix in abstaining from inquiry for six years; in being content with the *Parkers'* assertion that in 1878 the £11,000 was secured on mortgage, and in not asking for a proper security, or for a declaration of trust. By requiring neither a proper security nor the delivery up to them of the title deeds they voluntarily armed the *Parkers* with the means of dealing with the property as absolute owners free from any adverse equity, and for that neglect they must suffer: *Rice* v. *Rice* (5), followed in *Bickerton* v. *Walker* (6). To sum up our argument, we say (1) that whatever mortgage or declaration of trust there may have been, it could only affect the freehold property vested in *Vernon & Ewens* on the 31st of December, 1878, that is, the one acre; (2) that no declaration of trust of any part of the mortgage to the *Parkers* for £50,000 has been proved; the security, if any, being at most only a sub-mortgage, as stated

(1) 4th Ed. p. 1166.
(2) Law Rep. 7 Ch. 75.
(3) Ibid. 259.
(4) 1 Drew. 193, 200.
(5) 2 Drew. 73, 84.
(6) 31 Ch. D. 151, 159.

V.-C. B. 1886 *In re* VERNON, EWENS, & Co.

in the summons; (3) if an agent commits a fraud the loss falls rather on the innocent principal than on the innocent stranger; and (4) a party coming to impeach a *bonâ fide* conveyance for value without notice on the ground of the fraud of his agent must shew that he has not by his own negligence enabled the agent to commit the fraud.

*Marten*, Q.C., and *Maidlow*, for the *Worcester Bank*:—

The *Parkers* were simply debtors to *Hervey*: no advance was made by himself. In none of the mortgages was any money really advanced at all, which distinguishes this case from *Cory* v. *Eyre* (1) and that class of cases, where the money was advanced in hard cash upon a contributory mortgage. Here we have nothing but a representation by the *Parkers* that a mortgage was existing. No doubt this was a false representation; but that did not give *Hervey* or his administratrix such a right to the property as to prevent the *Parkers* from dealing with it in favour of a subsequent purchaser: it might have created personal equities as against the *Parkers*, but did not create any equitable estate: *Keate* v. *Phillips* (2); *Stanhope* v. *Earl Verney* (3). If Mrs. *Parratt* has any interest at all, it is merely that of an equitable sub-mortgagee.

It cannot be said that an original mortgagor, or any one claiming through him, is a trustee for the sub-mortgagee; there is no privity of estate between them: *Shaw* v. *Foster* (4). The relations between mortgagee and mortgagor and between *cestui que trust* and trustee are quite distinct, as is shewn by the *Trustee Act*, 1850, which contains a different set of provisions for each of the two cases. The present case is governed by the principle running through the doctrine of principal and agent, that "where one of two innocent persons must suffer, that party shall suffer who by his own acts and conduct has enabled the other to be imposed upon": *Gordon* v. *James* (5). Here *Hervey* allowed the *Parkers* to receive large sums of money on his behalf, and was satisfied, without further inquiry, with representations as to the mode

(1) 1 D. J. & S. 149.
(2) 18 Ch. D. 560.
(3) 2 Eden, 81.
(4) Law Rep. 5 H. L. 321.
(5) 30 Ch. D. 249, 258.

in which they were invested; he is, therefore, the party to suffer by his neglect. His negligence, and also that of his administratrix, in not obtaining possession of the title deeds, deprives both of all claim to priority: *Perry-Herrick* v. *Attwood* (1), followed by Vice-Chancellor *Hall* in *Clarke* v *Palmer* (2).

*Hemming*, in reply:—

I rely on the order of Mr. Justice *Cave* made on the 26th of March, 1885, in the *Parkers'* bankruptcy as entitling me to say that the trust as to £11,000, part of the mortgage money, was created. That is an order of a Court of co-ordinate jurisdiction, and although it is true the company were not parties to the proceedings, still the order was made upon the very same evidence now before your Lordship, and I ask the Court to come to the same conclusion upon it. Our security is not a mere sub-mortgage. The whole of the evidence supplied by the entries, accounts, and correspondence is consistent with the fact, as found by Mr. Justice *Cave*, that the £11,000 was part of a contributory mortgage on *Vernon & Ewens'* property at *Cheltenham*. We therefore claim to be mortgagees of the property comprised in the deed of the 12th of October, 1882. As to the defence that the company bought innocently in the market and are therefore to be protected, *Colyer* v. *Finch* (3) decides that "purchase for value without notice" is no defence to a mortgagee coming to enforce his security. But the company is not in reality a purchaser at all; and certainly not for value without notice. It was altogether a sham company; the *Parkers* were really the company, and there was, in fact, no purchase at all. As to the argument that I am only an equitable mortgagee, *Colyer* v. *Finch* applies as much to equitable as to legal mortgagees, and establishes my right to a claim for relief either on the footing of a mortgagee asking for foreclosure, or on the ground of my right to participate to the extent of my £11,000 with any other mortgagees from whom any further part of the advance may have been obtained. As an equitable mortgagee only, I rely on *Bradley* v. *Riches* (4),

(1) 25 Beav. 205; 2 De G. & J. 21.
(2) 21 Ch. D. 124.
(3) 19 Beav. 500; 5 H. L. C. 905.
(4) 9 Ch. D. 189.

V.-C. B.
1886
*In re* VERNON, EWENS, & Co.

which was, as here, the case of an equitable contributory mortgage.

It is clear from *Cory* v. *Eyre* (1), *Bradley* v. *Riches* (2), and *Shropshire Union Railways and Canal Company* v. *Reg.* (3), that whether a purchaser for value has notice of the prior incumbrance or not the mortgagee's right is not ousted; and that allowing the security to stand in the name of his solicitor-trustee is not such negligence as to disentitle the mortgagee to priority. That *Parkers* were trustees of the security for £11,000 is, I submit, clearly established by the evidence.

The authorities cited against us are cases upon a totally different state of facts. In *Rice* v. *Rice* (4) and *Bickerton* v. *Walker* (5) the question was as to the effect of receipts indorsed, in the one case on a conveyance and in the other on a mortgage. Those cases decide that if a man puts his name to a document saying that he has received the money therein mentioned, and allows that document to be used by any person, he cannot come to the Court on the footing that he has not received the money and say, "Though I said I received the money, I never, in fact, got it." In such a case the Court says, "Having made a false admission and led other persons astray thereby, you cannot now say it is not true and claim priority." Those cases, therefore, have no application to the present.

With regard to the passage cited from *Seton* on Decrees (6), there is no such general proposition of law to be found in the authorities. On the contrary, in the cases upon which I rely the *cestui que trust* innocently allowed his trustee to hold the money, yet he was not held to be the person to suffer the loss. *Hunter* v. *Walters* (7) was a complicated case, and has nothing to do with the present. *Pilcher* v. *Rawlins* (8) was also a case of complicated fraud, and its circumstances bear no resemblance to those here. The Court found that the legal estate was in the second incumbrancer, and there left it. Here no question arises about the legal estate. *Waldron* v. *Sloper* (9) was another very complicated

(1) 1 D. J. & S. 149.
(2) 9 Ch. D. 189.
(3) Law Rep. 7 H. L. 496.
(4) 2 Drew. 73.
(5) 31 Ch. D. 151.
(6) 4th Ed. p. 1166.
(7) Law Rep. 7 Ch. 75.
(8) Ibid. 259.
(9) 1 Drew. 193.

case. The plaintiff, a first incumbrancer, had by laches enabled one *Matthews* to commit a fraud, and he was held guilty of such negligence as to postpone him to a subsequent incumbrancer claiming through *Matthews'* fraud. Here all question of negligence is put out of the case by *Cory* v. *Eyre* (1). In *Keate* v. *Phillips* (2) the question was as to the priorities of various incumbrancers under a complicated series of facts which have no relation to the present case.

In *Stanhope* v. *Earl Verney* (3) the second incumbrancer had got a declaration of trust of an attendant term as well as the legal estate in the inheritance, and there was no declaration of trust in favour of the first incumbrancer. That case is therefore clearly distinguishable. In *Shaw* v. *Foster* (4) a purchaser had deposited his contract with bankers to secure a loan, and the question was whether a notice given by the bankers to the vendor was sufficient to make him a trustee for them, and it was held that the notice was insufficient in its terms. That case has therefore no bearing on the present. *Gordon* v. *James* (5) is like *Rice* v. *Rice* (6) and *Bickerton* v. *Walker* (7). There, mortgagees signed a receipt indorsed on a deed, but no money passed, and it was held that they lost their priority because they put the deed, which stated they had been paid, into the hands of their solicitors, and thus allowed the solicitors to raise money on it. That case has no application to the present, for we signed no receipt. In *Clarke* v. *Palmer* (8) the first mortgagee was postponed on the ground of negligence, because he left the deeds in the hands of the mortgagor; but it has been held in the cases upon which we have relied that a first incumbrancer acting as we have done is not guilty of negligence. Our summons suggests that we are either sub-mortgagees or part owners as contributory mortgagees: we have a good case on either point, but no doubt on the evidence the latter is the true view, and we claim on that alternative. There is no trace of a sub-mortgage, though if there were we should still have been entitled to relief. The evidence, however,

(1) 1 D. J. & S. 149.
(2) 18 Ch. D. 560.
(3) 2 Eden, 81.
(4) Law Rep. 5 H. L. 321.
(5) 30 Ch. D. 249.
(6) 2 Drew. 73.
(7) 31 Ch. D. 151.
(8) 21 Ch. D. 124.

V.-C. B. 1886 *In re* VERNON, EWENS, & Co.

establishes that we are part owners under the contributory mortgage to the extent of £11,000. The trust is clearly established, and there is really no difference in the circumstances under which the trust was created in *Cory* v. *Eyre* (1) and in this case.

1886. Feb. 24. BACON, V.C.:—

A joint stock company, bearing the name of *Vernon, Ewens, & Co., Limited,* was registered in July, 1883. By an order of this Court, made in June, 1884, the company was ordered to be wound up, and the proceedings under that order are now in progress. In the course of those proceedings a summons was taken out by Mrs. *Mary Sarah Parratt* as administratrix of her brother, the late *William Lamplugh Hervey,* claiming a declaration that, subject to a previous mortgage to the *Worcester Bank* of the land and works of the company at *Alstone* for two sums of £750 and £8000 (as to which there is no dispute), she is entitled as sub-mortgagee for £11,000 and interest, or as part owner in equity to that extent, of a security held by *Frederick Searle Parker* and *William Searle Parker,* comprising the same land and works, for £50,000, created by a mortgage of the 12th of October, 1882; and that, as to 3A. 0R. 8P., part of the mortgaged property, the legal estate in which was outstanding when the two *Parkers* conveyed the same land and works to the company as hereinafter mentioned, she has priority over the estate of the liquidating company, and that upon satisfaction of the prior mortgage the securities may be marshalled.

This summons is opposed by the liquidator of the company. It is also opposed by the *Worcester Bank* for some reason which has not been explained to me and since the priority of the bank's security is in no way questioned, I am unable to ascertain why they should take part in the present contention.

The facts of the case can hardly be said to be in dispute. They are somewhat complicated and obscure as regards the details of the several dealings which have taken place, and which have been discussed at very great length; but the main and only important facts are clearly ascertained.

(1) 1 D. J. & S. 149.

In and before the year 1878 and afterwards, Messrs. *Vernon & Ewens* were carrying on an extensive business as engineers and ironfounders at *Alstone*, near *Cheltenham*. Messrs. *F. S. Parker* and *W. S. Parker* were solicitors in *London*, engaged, it appears, in a very large business, and pecuniary transactions took place before and after 1878 between them and their clients, *Vernon & Ewens*, the result of which was that the latter became largely indebted to the former, who are said, in the stock-jobbing jargon which nowadays pollutes "the well of English undefiled," to have "financed" the engineers in their business; and several securities on their property at *Alstone*, the particulars of which are of no present importance, were executed by *Vernon & Ewens* to the two *Parkers*.

During the same period and up to the time of his death in 1879 *William Lamplugh Hervey* was a client of the *Parkers*, who were intrusted by him with considerable sums of money for investment upon securities for his benefit. In December, 1878, it appears that the *Parkers* had in their hands a sum of £11,000, which they then represented to have been lent by them on his behalf to Messrs. *Vernon & Ewens*, and on which the *Parkers* accounted to him for the interest at 5 per cent. per annum.

Upon the death of Mr. *Hervey*, the *Parkers*, who were continued in their employment of solicitors by his administratrix, the present claimant, prepared for her the residuary account of his estate. In that account, under the head of "mortgagors' names," they inserted "No. 8, *Vernon & Ewens*, freehold property at *Cheltenham*," the rate of interest being stated to be 5 per cent. per annum; and the amount due at the death of Mr. *Hervey* for interest as being "£13 5*s.* 6*d.*," and this account they procured to be signed by the administratrix and passed at the Legacy Duty Office in July, 1880.

In the month of May, 1883, *William S. Parker*, on behalf of his firm, and as her solicitor, wrote the claimant a long letter relating to the division of her brother's estate. In that letter he purports to give a list of mortgages, the heading being "The estate consists of the following mortgages." The list is made out in columns, headed "Mortgagors' names," "Premises," "Amount of principal," "Rate of interest"—and the line which is num-

V.-C. B. 1886 *In re* Vernon, Ewens, & Co.

bered 8, runs thus, "*Vernon & Ewens*, freehold property, works, and premises at *Cheltenham*, £11,000, interest 5 per cent." The rest of the letter contains suggestions as to the division of the securities and other topics immaterial to the present question; but it also contains the following passage:—"The question of these mortgages is really what puzzles us. At the time the money was lent by your brother the properties were, each of them, of very much greater value than the sums that were lent; and the fall in their value is simply owing to the depression of trade and the several bad agricultural years there have been."

At the date of this letter it would appear that several dealings had taken place between the *Parkers* and *Vernon & Ewens* and a Mr. *Davis* with the property in question. Besides what I must suppose was the original property of *Vernon & Ewens*, there had been acquired the fee simple of 3A. 0R. 8P. of land which had been added to and formed part of the premises on which the business was carried on, and a small leasehold had also been acquired by *Vernon & Ewens*, and employed in like manner. It is not easy to understand, nor does it appear material that it should be further investigated, how Mr. *Davis* became interested in the subject, but it is clear that by a deed of the 12th of October, 1882, made between *Davis* and the *Parkers*, *Davis* asserting himself to be owner in fee simple of the freehold properties, and assignee of the leasehold, conveyed the freeholds and demised the leasehold to the *Parkers*, by way of mortgage, for securing £50,000, reserving to himself the right of making a mortgage for £20,000, which the *Parkers* agreed should have priority over the £50,000. *Davis* availed himself of this power by executing to the *Worcester Bank* a mortgage for £8000, the priority of which the claimant does not dispute.

It is not, in the view I take of the case, necessary or useful to pursue the devious track of the dealings which have taken place, all of which were without notice to, or knowledge of, or participation in by the claimant. *Davis* appears to have soon retired from the engagement he had entered into, and by a deed of the 7th of February, 1883, in consideration of his being released by the *Parkers* from his mortgage debt of £50,000, and their engagement to pay the mortgage debt of £8000 to the *Worcester Bank*, he

conveyed the whole of the lands and works to the *Parkers*, *Vernon & Ewens* being the tenants of the premises, and of the plant, machinery, and chattels, under a previous agreement with *Davis*.

This appears to have been the state of things when, in July, 1883, the joint stock company was formed and registered. A deed was then executed, dated the 10th of December, 1883, between the two *Parkers* of the first part, *Vernon & Ewens* of the second part, and *Vernon, Ewens, & Co., Limited*, the joint stock company, of the third part. [His Lordship then read the recitals and the operative part of the deed, and proceeded:—] The shares which are stated to be the consideration for this deed appear to have been issued to the *Parkers* and to *Vernon & Ewens* the alleged "beneficial owners" of the property thus transferred, and in all probability this was so, although, owing to the destruction, by an accidental fire, of the company's books, there is no distinct proof of this fact. But it is not alleged, nor is there any reason to believe, that a single shilling of money or any other consideration passed between the parties.

The company, which is stated to have been thus formed, thereupon entered into possession of the property conveyed to them. Their engineering existence appears to have been of remarkably short duration, for by an order, which I have before mentioned, in June, 1884, the company was wound up. Messrs. *Parkers* were adjudicated bankrupts in March, 1884. I am compelled to know that in several instances in this Court, and in other branches of this jurisdiction, heavy imputations of misconduct have been preferred against them. I am not able to decide judicially as to any of those imputations, because the *Parkers* have, by absconding from this country, baffled any pursuit against them, and by their absence have prevented the claimant from the discovery which she is entitled to, and which she could obtain if they were within the reach of the law. I may, however, observe, that by an order of the Court of Bankruptcy obtained by the claimant against the trustees of the *Parkers'* estate, the rights claimed in this summons have been established as against them, and the deeds held by the *Parkers* and the 5000 shares have by the bankruptcy trustees been delivered to the claimants. The liquidator of the

V.-C. B. 1886 *In re* VERNON, EWENS, & CO.

company was not, as far as I know, a party to the bankruptcy proceedings; but it is certain that he has taken no step to dispute the order, nor has he filed any affidavit in answer to the allegations contained in the claimant's evidence on the subject.

The case has been fully argued, and on the part of the company it has been insisted that the evidence does not establish a trust by the *Parkers*, but amounts at the most to a personal obligation on them to the extent of £11,000; and it was insisted that the money having been left in the hands or under the control of the *Parkers* without any inquiry, it ought to be held that the intestate in his lifetime and the claimant since his death relied only upon the word of the *Parkers*, and that there is no necessary connection between the mortgage for £50,000 which they took and the £11,000 for which they were accountable to *Hervey* and his estate; and many authorities were referred to in support of this contention, but none of them support the liquidator's contention.

It appears to me, however, that the entries in the books of the *Parkers*, their written admission in the residuary account, and in the letter of May, 1883, do constitute a sufficiently clear statement that they had invested the money for *Hervey* upon a mortgage of the *Cheltenham* property, and that being, as they were, mortgagees of that property at the date of the last-named letter, they did thereby declare to the person who was alone interested in the subject that to the extent of £11,000 that person was entitled to the security upon which that sum had been by them invested.

No authority has been referred to which calls in question the plain principle on which I found this opinion; but the case of *Cory* v. *Eyre* (1), which has been referred to, seems to me not only to authorize the conclusion I have drawn, but also to answer the imputed negligence of the claimant, who had no reason, nor had her brother in his lifetime, to distrust the *Parkers*, nor was either of them under any obligation to make further inquiry, or require proof that their solicitors and agents had faithfully discharged their duties.

Another objection of the liquidator is that the company were

(1) 1 D. J. & S. 149.

purchasers for valuable consideration without notice. This is a defence which, when it is set up, can only be supported upon clear and satisfactory evidence; the onus is cast upon the party asserting, and the evidence must, in cases in which individuals so assert, be personal and subject to the closest cross-examination. In the case of a corporation, no doubt, a personal examination is not practicable, but acting, as they must, by officers or agents, and having abundant means of giving proof of facts accompanying the transaction, it might not unreasonably have been expected that they would prove by whom and how the company was promoted and formed, between what persons the bargain for so large a sum as the purchase-money was made, and how the supposed value of the thing bought and sold was arrived at.

Now, the only evidence adduced by the liquidator in support of his contention consists of affidavits by himself and former officers of the company, the only substantial fact deposed to by each of these deponents being that he had no notice of the claimant's interest in the property, which may be true, but which falls wholly short of such evidence as is requisite to support the contention of purchase for valuable consideration without notice. They all of them speak of their personal knowledge, which must of necessity be knowledge acquired after the sale and after the conveyance, but they all say—in answer to the allegation in the claimant's affidavit that Messrs. *Parkers* were the only solicitors employed—that there was another solicitor employed, a certain Mr. *Walker*. Their evidence amounts only to the assertion that the deponents did not receive notice of the claim; and no doubt many other persons more or less in the employment of or connected with the company might have made similar affidavits.

There is, however, one person named who might have given more pertinent evidence. The claimant has suggested that the *Parkers* were not only vendors to but the solicitors of the company, although another person was nominally the company's solicitor. The affidavits I have referred to all agree in denying that the *Parkers* were the solicitors, and assert that a Mr. *Walker* was and acted as solicitor to the company, his name being also inserted in the articles of association. This gentleman, therefore, upon the statement of the liquidator and his witnesses, must have

V.-C. B. 1886 *In re* VERNON, EWENS, & Co.

been able to give plain and positive evidence of the facts material and essential to support, if it could be supported, the allegation of want of notice and purchase for valuable consideration, but he is not adduced as a witness, nor has any reason been suggested which will account for his absence. Under these circumstances I am of opinion that the allegation is not supported, that the onus on the liquidator is not discharged, and that upon the evidence before me the claimant is entitled to an order in the terms of her summons. The costs of the summons must be added to her security.

Solicitors: *Dixon, Ward, & Co.; Francis & Johnson; Church, Rendell, & Co.*

G. I. F. C.

---

V.-C. B. 1886 *March 5.*

## MORGAN *v.* BRISCO.

[1884 M. 1111.]

*Practice—Specific Performance—Order on Further Consideration—Defaulting Defendant—Four-day Order—Form of Order.*

Form of four-day order in an action by vendor for specific performance, where the Defendant has persistently endeavoured to evade both the judgment and the order on further consideration.

THE Chief Clerk, by his certificate, dated the 28th of January, 1886, in pursuance of the order made in this case, as already reported (1), certified that a conveyance by the Plaintiff to the Defendant as an escrow (to be delivered to the Defendant on payment of the purchase-money within the time limited) of the premises comprised in the contract, had been settled by the Judge: that such conveyance consisted of an indenture intended to be made between the Plaintiff of the one part, and the Defendant of the other part, and identified by his (the Chief Clerk's) signature in the margin thereof: that Monday, the 22nd of February, 1886, between the hours of 1 and 2 in the afternoon, and the Chapel of the Rolls, *Rolls Yard, Chancery Lane*, were the time and place appointed by the Judge when the Defendant was to pay to the

(1) 31 Ch. D. 216.

Plaintiff the sum of £3300 4*s.* 4*d.* in the said order mentioned, together with the sum of £73 8*s.* 4*d.* for further interest at the rate of 5 per cent. per annum on the sum of £2902 10*s.* from the 15th of August, 1885, to the said 22nd of February, 1886 (less income tax), making together the sum of £3373 12*s.* 8*d.*

The Plaintiff, by his attorney, duly attended at the time and place so appointed, to receive from the Defendant the sum fixed by the certificate, but the Defendant failed to attend, and the money still remained due.

The Plaintiff accordingly now moved that he might be at liberty to forthwith deposit in Court to the credit of the action the escrow and title deeds, and other deeds and documents relating to the property the subject of the action, and that the Defendant might be peremptorily ordered to pay to the Plaintiff, at the office of his solicitors (naming them) within four days, or such other period as the Court might direct, the sum of £3373 12*s.* 8*d.* found due to the Plaintiff by the Chief Clerk's certificate in respect of the purchase-money and interest up to the 22nd of February, 1886, together with subsequent interest at the rate of 5 per cent. per annum on the sum of £2902 10*s.* (the original balance of the purchase-money), from the said 22nd of February, 1886, to the day to be fixed for payment.

It appeared that an action was pending by the Defendant against the Plaintiff impeaching the validity of the contract.

*Marten*, Q.C., and *Alan Stewart*, for the Plaintiff.

*Millar*, Q.C., and *Herbert Foss*, for the Defendant :—

We submit to pay the money into Court, which will be a sufficient protection to the Plaintiff pending our action against him.

BACON, V.C. :—

I give the Plaintiff leave to deposit the escrow and deeds in Court, and make a four-day order for payment as asked.

The Plaintiff then deposited the escrow and deeds with the proper officer of the Court, and filed an affidavit that he had

V.-C. B. 1886 MORGAN v. BRISCO.

done so. Thereupon the order was drawn up in the following form: "It is ordered that the Defendant (name) do, within four days after service upon him of this order pay to the Plaintiff (name), at the office of, &c., the Plaintiff's solicitors, the sum of £3373 12*s.* 8*d.*, being the amount found due to the Plaintiff by the Chief Clerk's certificate, dated the 28th of January, 1886, in respect of the purchase-money and interest up to the 22nd of February, 1886, together with subsequent interest at the rate of 5 per cent. per annum on the sum of £2902 10*s.* from the said 22nd of February, 1886, to the day of payment: and it is ordered that the Defendant do pay to the Plaintiff his costs of this application, such costs to be taxed by the Taxing Master."

Solicitors: *Talbot & Quayle,* for *Talbot & Wood, Newtown; R. A. Biale.*

G. I. F. C.

---

V.-C. B. 1886 *March* 6.

## HOARE *v.* STEPHENS.

[1882 H. 1057.]

*Practice—Mortgage—Foreclosure Action—Receiver—Accounts—Foreclosure absolute.*

In a foreclosure action the fact that a receiver appointed by the Court has received rents since the certificate under the order *nisi* is no bar to an immediate order of foreclosure absolute on default of payment pursuant to the certificate.

*Jenner-Fust* v. *Needham* (1) not followed.

THIS was a common foreclosure action, in which the usual judgment was pronounced on the 8th of November, 1883, upon an affidavit of service on the Defendants, who did not appear, the time fixed for redemption being six months from the date of the Chief Clerk's certificate.

On the 31st of March, 1884, an order was made, upon the application of the Plaintiffs, appointing a receiver of the rents of the mortgaged property.

On the 10th of August, 1885, the Chief Clerk made his certificate under the judgment and thereby found that £49,331 7*s.* 3*d.*

(1) 31 Ch. D. 500.

would be due from the Defendants to the Plaintiffs for principal, interest and costs, on the 10th of February, 1886, when the six months would expire.

The Defendants having failed to pay the money, the Plaintiffs now moved for an order of foreclosure absolute, and to be let into possession; also that the receiver might pay to the Plaintiffs the balance of rents in his hands and be discharged without passing his accounts, and his recognizance vacated.

The receiver had in his hands about £700 representing rents, but there was no evidence as to when he received the money, though it appeared that part of it represented rents received by him since the certificate. He had not yet passed any account, and the property was now of considerably less value than the mortgage debt.

The motion was made upon notice and affidavit of service, the Defendants not appearing.

*Marten*, Q.C., and *Morshead*, for the Plaintiffs:—

Our right to the usual order for foreclosure would have been unquestionable had it not been for the recent case of *Jenner-Fust* v. *Needham* (1), in which Mr. Justice *Pearson* decided, under similar circumstances to the present, that the receiver must pass his accounts, and pay over his balance; then that a fresh account must be taken of what was due to the plaintiffs, the defendants being allowed for redemption a month from the date of the new certificate. We submit that that decision must have been arrived at under some misapprehension as to its effect, and should not be followed. First, we say that the result of such a decision will be that the plaintiff in a foreclosure action can never get a final order of foreclosure at all, for he will find himself obliged to render perpetual accounts: he cannot stop the receiver from receiving, and the defendant may object to his being discharged. Where no receiver has been appointed, the plaintiff, of course, has the matter in his own hands, and can say he will not receive any rents until after foreclosure absolute. It cannot be said that moneys received by the receiver are moneys received by the plaintiff or by any person by his order or for his use. Again,

(1) 31 Ch. D. 500.

V.-C. B. 1886 HOARE v. STEPHENS.

no inconvenience can arise from making the final order, because, supposing the defendant wishes to have the advantage of any rents come to the hands of the receiver, he may apply before the expiration of the six months that the receiver may be at liberty to pay the money in his hands to the plaintiff in reduction of the debt, and for liberty to redeem on payment of the balance.

BACON, V.C.:—

I think you are entitled to an order according to the notice of motion.

Solicitors: *Tylee, Wickham, Moberly & Tylee.*

G. I. F. C.

---

V.-C. B. *March* 11, 15, 16.

## *In re* WHITELEY. WHITELEY *v.* LEAROYD.

[1885 W. 454.]

*Trustees—Investment—"Real Securities"—Mortgage—Trade Premises—Brickfield—Houses—Valuation—Breach of Trust.*

A power for trustees to invest on "real securities" does not authorize an investment on freehold property—such as brickworks—dependent for its value upon a trade or business carried on thereon.

*Re Pearson* (1) not followed.

Trustees who have invested trust funds upon mortgage of house property are not liable for loss through subsequent depreciation of the security arising from change of fashion or other circumstances incidental to house property, provided the trustees took care, in making the investment, to act upon due inquiry and a proper valuation and report made by an independent surveyor.

*BENJAMIN WHITELEY*, by his will, dated the 19th of March, 1874, appointed the Defendants, *Learoyd*, an accountant, and *Carter*, a schoolmaster, his trustees and executors; and directed them, at the expiration of one calendar month after his death, to invest, conformably to the clause for investment thereinafter contained, the sum of £5000 free of duty, and to pay the income thereof to the Plaintiff, *Elizabeth Whiteley*, then *Elizabeth Wrigley*, during her life for her separate use, without power

(1) 51 L. T. (N.S.) 692.

of anticipation: and after her death to stand possessed of the said sum of £5000, or the investments thereof, in trust for her children as therein mentioned. And the testator devised his residuary real and personal estate to the Defendants upon the trusts therein mentioned. The will contained a power for the trustees to invest all trust moneys held thereunder on the securities therein mentioned, which comprised the usual trustees' investments and "real securities in *England* or *Wales*." The will also contained the usual trustee clauses, including an exemption from liability for involuntary losses.

The testator died on the 12th of July, 1876. Subsequently to his death the Plaintiff married *Benjamin Whiteley*, jun., who died intestate on the 12th of November, 1880. There were issue of the marriage three children, all of whom were infants.

The Defendants set apart out of the testator's estate £5000 to answer the above-mentioned legacy, and of this sum they invested £3000, together with a sum of £500 derived from another source, upon a 5 per cent. mortgage, dated the 12th January, 1878, by Messrs. *Barstow & Hartley*, brick and sanitary tube manufacturers, of a freehold brickfield, containing about ten acres, with the machinery, brick and pipe kilns, and buildings thereon, situate at or near *Pontefract*, in the county of *York*, being the premises upon which the mortgagors were then carrying on their business. £2000, the remainder of the £5000, the trustees invested upon a 5 per cent. mortgage, dated the 13th of June, 1878, of four small freehold houses, one used as a shop, in *Earl Street, Lower Broughton Road, Salford*, near *Manchester*.

The Plaintiff regularly received the income of the £3000 mortgage until 1884, when, in March of that year, Messrs. *Barstow & Hartley*, the mortgagors of the brickworks, became embarrassed, and in October, 1884, they were adjudicated bankrupts. The mortgagor of the four houses never paid any interest on the £2000. In April, 1879, he filed a petition for liquidation, and the Defendants had since been and were now in possession of that property.

In consequence of the failure of the investments, the Plaintiff and her three infant children brought this action against the trustees claiming—(1) that the trusts of the will relating to the

V.-C. B.
1886
*In re* WHITELEY.
WHITELEY *v.* LEAROYD.

£5000 might be carried into execution under the direction of the Court, and that the Defendants might be ordered to invest £5000, or so much thereof as was not properly invested, upon the securities mentioned in the will; (2) that the Defendants might be ordered to pay to the Plaintiff, *Elizabeth Whiteley*, the income of the £5000 accrued due, or which, but for the default of the Defendants, would have accrued or been received by the Defendants since the testator's death, less the income already paid, and that in case it should appear that the £5000, or any part thereof, had not been properly invested upon income-producing securities, then that the Defendants might be charged with interest at 4 per cent. per annum on the £5000, or so much thereof as should not have been invested on income-producing securities, during such period as the same should not have been so invested, and that they might be ordered to pay such interest to the said Plaintiff; (3) a receiver; (4) damages for breach of trust and negligence; (5) appointment of new trustees; and (6) incidental relief.

The statement of claim charged the Defendants with breach of trust in investing the £5000 in securities improper and unauthorized by the will, and in not making proper inquiries as to the respective properties or the values thereof, or causing proper valuations to be made before advancing the trust funds.

After alleging the bankruptcy of the respective mortgagors and the failure in payment of interest, as already mentioned, the statement of claim went on to allege that the houses were at the time of the advance on the second mortgage, and were now, in a bad state of repair, and subject to a ground rent of £20 per annum, and that the rents had not been sufficient to pay for the ground rent and repairs.

In their statement of defence the Defendants denied having committed a breach of trust, and alleged that the investments were proper and authorized by the will: that the securities were, when taken, of sufficient value to secure the amounts advanced: that the Defendants made proper inquiries as to the values of the properties, and employed a most experienced and respectable firm of surveyors and valuers to examine, value, and report upon them, and were advised by such firm that they formed good

security for the sums proposed to be advanced; and that the Defendants, after due deliberation, decided, as the fact was, that such properties respectively formed proper investments within the terms of the will for the sums advanced.

The Plaintiffs having joined issue, the action now came on for trial.

Auctioneers and surveyors called on behalf of the Plaintiffs deposed that, as regards the brickfield, it was not worth in 1878 so much as £3000, the amount of the advance: that brickfields depreciated in value as the brickearth became worked out; that in the present instance the property had depreciated since 1878 about 33 per cent.: that it was now unsaleable: and that it was valueless for agricultural purposes and wholly unsuitable for building, being about a mile from *Pontefract*, a long distance from the highway, and full of excavations.

As regards the houses, the same witnesses deposed that in 1878 they were a totally unfit security for £2000: that in consequence of a great flood that occurred in the district in 1866, the neighbourhood in which they were situate had since become most undesirable for residential purposes: that they were in a bad state of repair and only occasionally occupied, and then only by an impecunious class of tenants; that the rents were wholly insufficient to pay even the ground rent and cost of repairs, and that only two of the houses were at present occupied.

The evidence on behalf of the Defendants was to the following effect:—

With regard to the brickfield, Messrs. *Barstow & Hartley*, the mortgagors, entered into partnership in 1874, the property being then valued for the purposes of the partnership at about £6000. The firm subsequently made an additional outlay of about £3000 on the property. The brickworks consisted of brick-kilns, a small house, several sheds and offices, a steam-engine and boiler, and other necessary plant and machinery, the whole covering about one acre and a half of the ten acres comprised in the mortgage. At the commencement of the partnership the firm deposited the deeds relating to the property with their bankers as security for £4200, which sum was paid off out of the advance by the trustees, to whom the bankers then handed the deeds.

V.-C. B.
1886
*In re* WHITELEY.
WHITELEY *v.* LEAROYD.

In 1877, with a view to obtaining a loan upon the property, the firm had it valued by a surveyor, who pronounced it to be a good security for £4600, without taking into account the machinery and plant. They then applied to the Defendants for an advance, whereupon the Defendants instructed their solicitor to employ Mr. *Utley*, a member of a firm of experienced land agents and valuers, to make a personal inspection and valuation of the property for their guidance. Mr. *Utley* accordingly visited the property, and in a report, dated the 8th of October, 1877, after giving details of the particulars of the brickworks, he said, "We are aware there should be a large margin in brickworks, as the material is constantly being worked out, but having carefully considered this, we think the land, premises, and freehold fixtures form a good security for £3500." Then, after referring to some improvements intended by Messrs. *Barstow & Hartley*, who, it was stated, wanted £4500 instead of £3500, the report went on to state, "When these things are carried out the security would certainly be as good for £4500 as it is now for £3500." The accuracy of this valuation was verified by several surveyors who inspected the property in 1885, and now stated that the valuation was a fair and honest one: they also expressed their opinion that in 1878 the property was worth, including the plant and machinery, at least £7000; that even at the present time, as between a willing seller and a willing purchaser, its value was not less than £4000; and that although the works had become depreciated in value owing to the prevailing depression in the building trade, there were some signs of revival. It appeared that Messrs. *Barstow & Hartley* had offered the property for sale in January, 1884, at a reserve price of £5000, but that it was not sold, the highest bid being only £3250.

As to the four houses mortgaged for £2000, the Defendants stated in evidence that in May, 1878, their solicitor was applied to by a Mr. *Middlewood* for an advance of £2000 upon the houses: that the houses were then in mortgage to a building society for £2200, and that, knowing that building societies invariably required a careful valuation and report before advancing money, the Defendants thought this fact in itself justified the advance: that they nevertheless employed Mr. *Utley* to personally inspect

the property and report upon it, and that he accordingly, in a report dated the 12th of June, 1878, stated that the property "formed a good security for £2000"; that on the faith of that report they advanced the money; that a building society advanced the mortgagor, *Middlewood*, a further sum on a second mortgage of the property; and that in March, 1879, after *Middlewood's* bankruptcy, the Defendants offered the property for sale by auction, when the highest bid was only £2030, but that as that sum was insufficient to pay principal, interest, and costs, the property was withdrawn, it being considered that at that time there was ample margin. The surveyors called on behalf of the Defendants expressed their opinion that the property was in 1878 a good security for £2000; that it was at present in a fair state of repair: that there had been since that time a considerable depreciation of property of that class; but that there was no reason why, with a revival of trade, the property should not all be tenanted and the rents improve.

*Marten*, Q.C., and *Seward Brice*, for the Plaintiffs:—

As to the £3000, a power to invest on "real securities" does not authorize investment in a trading concern such as this brickyard, a property yearly depreciating in value, and in fact valueless for any other purpose. It is not a security suitable for trust funds at all.

As to the £2000, the trustees were not justified in investing upon such a precarious property as these four small houses, in bad repair and subject to a ground rent.

In neither case was the actual value of the property ascertained by the trustees. For these improvident investments the trustees are clearly liable: *Ingle* v. *Partridge* (1); *Budge* v. *Gummow* (2); *Fry* v. *Tapson* (3). In *Smethurst* v. *Hastings* (4) your Lordship laid it down as a well-established rule that a trustee is bound to act in the execution of his trust as a prudent man would in dealing with his own property. That the trustees in the present case have not done.

(1) 34 Beav. 411.
(2) Law Rep. 7 Ch. 719.
(3) 28 Ch. D. 268.
(4) 30 Ch. D. 490, 498.

V.-C. B.

1886

*In re* WHITELEY. WHITELEY *v.* LEAROYD.

*Hemming*, Q.C., and *W. Baker*, for the Defendants:—

There is no authority for making trustees liable in such a case as this. In *Ingle* v. *Partridge* (1) the valuation was made on behalf of the mortgagor. Here a competent surveyor was sent down by the trustees to value the property on their behalf. In *Smethurst* v. *Hastings* (2) the trustees had no proper valuation or inquiries made. We did all in our power to ascertain the propriety of the investments, and we therefore claim the benefit of the doctrine laid down by your Lordship in that case. In *Fry* v. *Tapson* (3) the trustees relied on the valuation of the mortgagor's agent, instead of obtaining a valuation by an independent surveyor. In *Budge* v. *Gummow* (4) the trustees invested on a mortgage of a new hotel and license, the value of the hotel as a security being mainly dependent upon the license and its renewal, a matter solely within the discretion of the magistrates.

In *Speight* v. *Gaunt* (5) it was laid down by Sir *George Jessel*, M.R. (6), that "a trustee ought to conduct the business of the trust in the same manner that an ordinary prudent man of business would conduct his own, and that beyond that there is no liability or obligation on the trustee. In other words a trustee is not bound because he is a trustee to conduct business in other than the ordinary and usual way in which similar business is conducted by mankind in transactions of their own." Here the trustees acted as any prudent man would if he were about to invest his own money; they made inquiries and had the proposed securities inspected and reported on by a professional surveyor. The insufficiency of the securities has arisen through the depression of trade and the depreciation in the value of house property. These are accidents for which trustees cannot be held responsible. Thus in *In re Godfrey* (7) your Lordship held trustees not to be liable for the failure of a security of a farm through unfavourable seasons, on the ground that at the time they made the investment they acted as prudent men would do in their own

(1) 34 Beav. 411.
(2) 30 Ch. D. 490.
(3) 28 Ch. D. 268.
(4) Law Rep. 7 Ch. 719.
(5) 22 Ch. D. 727; 9 App. Cas. 1.
(6) 22 Ch. D. 739.
(7) 23 Ch. D. 483.

affairs; and your Lordship also held that the "two-thirds" rule was not enforceable with exact strictness. With regard to the £3000 investment the recent case of *Re Pearson* (1), before Mr. Justice *Pearson*, is a distinct authority that trustees having power to invest on real securities may invest on mortgage of brickworks.

*Marten*, in reply:—

*Re Pearson* is distinguishable. There a definite value was put upon the property, and the security was considered so good that the bank, who had a prior mortgage, were willing to postpone their security. I submit it is improper for trustees to lend on security of such a speculative character as a business, or on property dependent for its value upon the continuance of the business carried on upon it.

BACON, V.C.:—

The complaint made by the Plaintiff, Mrs. *Whiteley*, is, that the trustees of the will under which she claims, being authorized to advance the trust fund on real securities, invested it on securities the value of which was not equal to the sum advanced. The motives of the Defendants are not called in question in any way: the evidence entirely fails to establish any negligence or improper conduct on their part.

The case is reduced almost entirely to this single point. The trust upon which the Defendants held the £5000 did not authorize them to advance any part of it on the security of a trade: and, upon the evidence, in my opinion, part of it was, in fact, advanced upon the security of a trade. That trade has ceased to exist, and the property has become—I will not say valueless—but so depreciated that it is impossible to recover the sum advanced. I know of no case, except that of *Re Pearson*, before Mr. Justice *Pearson*, which says that the trade of brickmaking falls within the description of a "real security." The evidence is that upon the mortgagors, Messrs. *Barstow & Hartley*, entering into partnership in 1874, the property was valued at about £6000, and that the partners subsequently spent more than

(1) 51 L. T. (N.S.) 692.

V.-C. B. 1886 *In re* WHITELEY. WHITELEY *v.* LEAROYD.

£3000 upon it; that, on entering into partnership, the firm deposited the deeds relating to the property with their bankers as security for £4200; that the bank, on payment of their debt out of the advance made by the Defendants, handed over the deeds to them, the property having been previously pronounced, by a valuation made in 1877, to be a good security for £4600, independently of the machinery and plant. But all this does not alter the nature of the property. The property is of a description liable to all the fluctuations of trade, and, as a matter of fact, the mortgagors have become bankrupts. The money was really advanced on the security of a trade, and not upon the security of a substantial property. It is quite true that a valuation was made by a surveyor, Mr. *Utley*, for the purpose of the proposed mortgage; that the valuation goes into the details of the brickworks, and carefully enumerates the several articles of machinery, plant, and stock upon the property. [His Lordship then read the material parts of Mr. *Utley's* valuation, as above stated, and continued:—] That valuation has been verified by several other surveyors who were called as witnesses for the Defendants, and whose evidence is distinct that, reading Mr. *Utley's* valuation by the light of what they saw when they went over the property in 1885, that valuation was perfectly just and honest. All that is very clear and satisfactory: but the question here is whether the Defendants, the trustees, have acted in the matter as prudent persons would have acted in their own concerns. That is the question which must determine this case. It is a point of some importance that none of the buildings on the land are of any available value. Of the land itself about one acre and a half has been used for the actual brickworks, but what is left is not of any use for agricultural purposes. Giving the trustees credit for the most honest intentions, was it right for them to invest £3000 upon property of this description—a sum which they could not hope to get back unless the mortgagors' business should turn out to be profitable? The result is that £3000 was lent on the security of a brickfield and machinery, the full value of which was about £7000: but to maintain the security at that value entailed the necessity of continuing to carry on the business. There still remains this fact, that a sum of £3000 was lent

on a mortgage of this property; and how were the mortgagees to proceed, in case of default of payment, to get their mortgage money back? The value of the property, so far as it can be ascertained from the attempted sale of the property in 1884, is a little more than £3000: the mortgagors, who tried to sell it, had fixed the reserve price at £5000. The point of the case is, were the trustees, giving them full credit for good intentions, but being under the obligation to do with the trust money in their hands what a prudent man would do with his own money, justified in lending so large a sum as £3000 without any certain prospect of getting it back again except by legal proceedings? There did not appear to be the slightest prospect of their doing so. The evidence shews that a brickfield gradually depreciates in value as it is worked out: at all events in the present case the property has undergone a depreciation of between 30 and 40 per cent. The question remains, are trustees justified in lending trust money on trade premises the value of which depends upon whether the trade is profitable or the reverse? I cannot say they are.

Then remains the other question, were the trustees justified in lending £2000 on the four freehold houses? That question stands on a totally different footing to the other. The four houses clearly came within the description of "real securities." They were duly valued by Mr. *Utley* prior to the advance being made, and were pronounced by him to be a good security for £2000. It appears that at that time the houses were already in mortgage to a building society for £2200, and as the rules of a building society require property to be valued by a competent surveyor before money is lent upon it, the trustees were justified in considering that these houses formed a good security for £2200. The trustees accordingly lend £2000 upon them. As to this security, it appears to me that the Plaintiff, Mrs. *Whiteley*, has no right or reason to complain. The property has become uninhabited through one of those inevitable accidents which must happen to all house property, but that cannot affect the trustees injuriously. I am of opinion, therefore, that, as regards the £2000, the trustees made a perfectly proper investment, and are not liable to make good the deficiency.

V.-C. B.
1886
In re WHITELEY. WHITELEY v. LEAROYD.

With regard to the £3000, as I have already said, a mortgage of land and buildings used for the purposes of carrying on a trade, and dependent on that trade for its value, is not authorized by a trust empowering the trustees to invest on "real securities"; the Defendants therefore fail on this part of the case, and there must be an order for them to pay the £3000 into Court.

As regards the costs of the action, I shall not give any against trustees who are not chargeable with any improper conduct. As to the £2000, the trustees will have their costs out of the trust estate, or out of the £3000 for which they are liable to account. So far as relates to the £3000, there will be no order as to costs.

Solicitors: *Jackson & Co.*, for *Jackson & Jackson, Middlesborough; Mackenzie & Rhodes*, for *G. Rhodes, Halifax.*

G. I. F. C.

---

V.-C. B.
1886
*April* 2.

## MASON *v.* WESTOBY.

[1886 M. 564.]

*Practice—Mortgagee in Possession—Surplus Rents—Receiver—Judicature Act*, 1873, *s.* 25, *sub-s.* 8.

Under sect. 25, sub-s. 8, of the *Judicature Act*, 1873, a mortgagee in possession is entitled to the appointment of a receiver, notwithstanding that he has been paid all his interest and costs out of rents received by him while in possession, and that he has surplus rents in his hands.

By an indenture dated the 1st of January, 1872, two freehold farms called the *Top Briggett Farm* and the *Low Briggett Farm, Messingham, Lincolnshire*, were conveyed by the Defendants, *David* and *Thomas Wakefield*, as owners as tenants in common, to the Plaintiff, *Hannah Mason*, in fee simple by way of mortgage for securing £3000, with interest at 4 per cent. per annum, payable half-yearly on the 1st of January and the 1st of July.

On the 27th of June, 1885, the half-year's interest due on the mortgage on the 1st of January, 1885, being unpaid, the Plaintiff took possession of the *Top Briggett Farm*. At that time the Defendant *Thomas Wakefield* was in the occupation of the *Low Briggett Farm*, and as he was in pecuniary difficulties, and had

denuded the farm of the live and dead stock and implements, the Plaintiff commenced an action against him in the Queen's Bench Division to recover possession, and on the 21st of July, 1885, obtained judgment in default of appearance, with the costs of the action, and also the costs of retaining possession of and reletting the two farms, and of realizing the crops on the *Low Briggett Farm*. On the same day, the 21st of July, 1885, the Plaintiff took possession of the *Low Briggett Farm*.

Both farms were at present let to a tenant at a yearly rent of £198.

Since taking possession the Plaintiff had, out of a sum of £285 received by her from a sale of crops and for rent from the tenant, retained all interest due to her, and the costs for which she had obtained judgment in the action in the Queen's Bench Division, there being a balance in her hands of £57 0*s.* 4*d.*

The farms were subject, as to the entirety, to a second mortgage for £500, and, as to a moiety, to a third mortgage for £1100.

The property having considerably decreased in value, and being, as the Plaintiff believed, an insufficient security for the several mortgage debts, the Plaintiff brought this action against the second and third mortgagees and the mortgagors for payment of her mortgage debt, or, in default, for sale or foreclosure, and now moved for the appointment of a receiver, submitting to account for and pay to the receiver, when appointed, the balance in her hands.

*Hemming*, Q.C., and *Nalder*, for the Plaintiff:—

Under the present practice a mortgagee can obtain a receiver although he may be in possession. Sect. 25, sub-s. 8, of the *Judicature Act*, 1873, enacts that "a receiver may be appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made." That section enables the Court to relieve a mortgagee in possession from the burden of his responsibilities by the appointment of a receiver.

*Warrington*, for the Defendants, the second and third mortgagees, supported the motion.

V.-C. B. 1886 MASON v. WESTOBY.

*Marten*, Q.C., and *Bissill*, for the Defendants, the mortgagors:—

There is no ground for the present application. The rent is higher than the interest on the mortgage debt; all interest has been paid, and there is a balance in the mortgagee's hands. There is, therefore, no necessity for the appointment of a receiver. All the mortgagee has to do is to receive the rent from the tenant, retain her interest out of it, and account for the surplus. Under such circumstances, it is not "just or convenient" that the mortgaged property should be saddled with the expense of a receiver.

BACON, V.C.:—

In my opinion it is clear that the Plaintiff is entitled to have a receiver appointed.

It appears to me that one object of the *Judicature Act*, 1873, was to enable the Court, by the appointment of a receiver, to relieve a mortgagee from the great burden imposed upon him by his entering into possession of the mortgaged property. In the present case, the mortgagee is alarmed at the depreciation of her security, and at the obligation resting upon her of dealing with the other mortgagees upon the property upon which she holds a first mortgage. It is said that the appointment of a receiver will cause great expense to the mortgagors: but that cannot be helped. The mortgagee, acting in accordance with her strict right, enters into possession because she cannot get her interest. As mortgagee in possession she becomes subject to heavy responsibilities, and from those responsibilities she is entitled to be relieved by the appointment of a receiver. She has, however, while in possession, received more than the amount of her interest and costs: that surplus she must pay to the receiver.

Solicitors: *Collyer-Bristow & Co.*, agents for *Freer, Hett & Hett, Brigg; Scott & Co.*, agents for *Plaskitt & Robbs, Gainsborough.*

G. I. F. C.

*In re* DEAN.
WARD *v.* HOLMES.

[1883 D. 275.]

KAY, J.
1886
*March* 24.

*Practice—Costs—Attempted Ineffectual Sale by Trustees—Change of Trustees and of Solicitors—Taxation of Costs of Old Trustees—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44)—*General Order, r.* 2 (*c*) ; *Sched.* 1, *Pt.* 1, *r.* 2.

Schedule 1, Part 1, rule 2 of the General Order to the *Solicitors' Remuneration Act*, 1881, applies only to cases where the attempted ineffectual sale and the subsequent effectual sale therein mentioned are conducted by the same solicitors.

If there is a change of solicitors after an attempted ineffectual sale, the taxation of the costs of such sale must be made under General Order, rule 2 (*c*).

## Adjourned summons.

Certain property forming part of the estate of the testator, *John Dean*, was put up for sale by public auction by the then trustees of his will, who employed a firm of solicitors for the purpose.

The property was offered for sale in twenty-six lots, but only two of such lots were sold.

This action was shortly afterwards instituted for the administration of the estate ; and in the course of the proceedings the old trustees retired and new trustees were appointed in their place, who employed another firm of solicitors to act in the trust. The order appointing the new trustees directed the taxation and allowance of the costs, charges, and expenses of the old trustees, and under it the old trustees carried in, amongst other costs, those of the sale by auction. The Taxing Master, however, only allowed them the percentage remuneration upon the two lots which were actually sold, and disallowed the costs and the disbursements connected with the attempted sale of the remaining lots. The old trustees objected to the taxation, but the Taxing Master refused to allow their objections, and gave the following answer : "There is provision in the *Solicitors' Remuneration Act*, 1881, for

KAY, J.
1886
*In re* DEAN.
WARD *v.* HOLMES.

the allowance of scale charges when property is not sold at the auction but sold subsequently. To allow the items objected to according to Schedule 2, might give the solicitor twice or thrice the amount he would be entitled to under the scale if the property had been sold. It could not have been intended to give more for doing half the work than the amount would have been if the business had been completed. The solicitor will receive at a subsequent period the scale charge when the property is disposed of, and, in addition, the charges provided for by rule 2." The old trustees accordingly took out a summons to review the taxation, and that summons was adjourned into Court.

The material clauses of the General Order under the *Solicitors' Remuneration Act*, 1881, are as follows:—

General Order, rule 2 (*c*): "In respect of business not hereinbefore provided for, connected with any transaction the remuneration for which, if completed, is hereinbefore or in Schedule 1 hereto, prescribed, but which is not, in fact, completed, and in respect of settlements, mining leases or licences, or agreements therefor, re-conveyances, transfers of mortgage, or further charges, not provided for hereinbefore or in Schedule 1 hereto, assignments of leases not by way of purchase or mortgage, and in respect of all other deeds or documents and of all other business the remuneration for which is not hereinbefore, or in Schedule 1 hereto, prescribed, the remuneration is to be regulated according to the present system as altered by Schedule 2 hereto."

Schedule 1, part 1, rule 2: "The commission on an attempted sale by auction in lots is to be chargeable on the aggregate of the reserved prices. When property offered for sale by auction is bought in and terms of sale are afterwards negotiated and arranged by the solicitor, he is to be entitled to charge commission according to the above scales on the reserved price where the property is not sold, and also one half of the commission for negotiating the sale. When property is bought in and afterwards offered by auction by the same solicitor, he is only to be entitled to the scale for the first attempted sale, and for each subsequent sale ineffectually attempted, he is to charge according to the present system, as altered by Schedule 2 hereto. In case

of a subsequent effectual sale by auction, the full commission for an effectual sale is to be chargeable in addition, less one-half of the commission previously allowed on the first attempted sale. The provisions of this rule as to commission on sales or attempted sales by auction are to be subject to rule 2."

*Hastings*, Q.C., and *Dunning*, in support of the summons:—

Schedule 1, part 1, r. 2, of the General Order under the *Solicitors' Remuneration Act*, 1881, only applies to a case where an attempted ineffectual sale and a subsequent effectual sale are conducted by the same solicitor. But this case falls within the General Orders, rule 2 (*c*), relating to business not thereinbefore provided for connected with an incompleted transaction, and the Taxing Master ought to have dealt with it accordingly, and to have allowed the costs of the ineffectual sale thereunder.

*Goldney-Cary*, for the Plaintiffs, *contrà*.

KAY, J.:—

As I understand rule 2 of Schedule 1, part 1, to the General Order under the *Solicitors' Remuneration Act*, 1881, the effect of it is this. If an attempted sale by auction fails, and the same solicitor afterwards carries out the sale either by negotiation or public auction, he is to get, not what he would have got if he had carried out the sale in the first instance, but that and something more for the abortive sale. That obviously can only apply where the same solicitor acts in both sales; but that is not the case here, as the new trustees decline to employ the same solicitors as their predecessors. The case, therefore, really comes to this. If the same solicitors were going to sell the property, whether by negotiation or public auction, they would get something for the abortive sale as well as for the actual value, rather more than they would have got if they had simply sold the property at the first sale. But if different solicitors act for the new trustees, and the subsequent sale cannot be carried out by the same solicitors as acted on the first occasion, the new solicitors will not get anything for the costs of the abortive sale. How,

KAY, J.
1886
*In re* DEAN.
WARD *v.* HOLMES.

then, must the costs of the abortive sale be dealt with? I think they must be dealt with under General Order, rule 2 (*c*). The Taxing Master in this case must tax these costs in some way or other upon that footing, and I send the matter back to him for that purpose. The costs of this application must be included in those costs.

Solicitors: *Bell, Brodrick, & Gray; Pitman & Sons.*

W. W. K.

## *In re* WELLCOME'S TRADE-MARK. *In re* BURROUGHS, WELLCOME & CO.'S TRADE-MARK.

CHITTY, J.
1886
March 5.

*Trade-mark—Registration by Agent in his own Name—Assignment—Goodwill—Rectification of Register—Patents, Designs, and Trade-marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 70, 78.

*M.* and *R.*, carrying on business as co-partners in *New York*, instructed their agents in this country, *B.* and *W.*, to register two trade-marks for goods of theirs, of which *B.* and *W.* had the exclusive sale. Such trade-marks were registered by *B.* and *W.* as to one in the name of their firm, and as to the other in the name of *W.* only.

*B.* and *W.*, having no beneficial ownership in the trade-marks, in August, 1884, assigned them to *M.* and *R.*

In December, 1884, one of the partners in the firm of *M.* & *R.* retired, and by deed assigned all his interest in the business of the firm and in the trade-marks to the continuing partners.

In December, 1885, another partner retired, and three new partners joined the firm, but no assignment was executed by the retiring partner.

On a motion by the present partners in the firm of *M.* & *R.*, and the last retiring partner, under sect. 78 of the *Patents, Designs, and Trade-marks Act*, 1883, that proper notices of the assignments of August, 1884, and December, 1884, might be entered on the register, and that the persons entitled under the last-mentioned assignment might be entered as the present proprietors of the trade-marks:—

*Held*, that the application might be granted, as the trade-marks had been transmitted in connection with the goodwill of the business of *M.* and *R.* within the meaning of sect. 70 of the Act.

## MOTION.

On the 10th of May, 1880, *H. S. Wellcome*, of the firm of *Burroughs, Wellcome, & Co.*, who were the agents in this country of *McKesson & Robbins*, carrying on business as wholesale druggists in *New York*, registered in his own name the trade-mark No. 22,389, and on the 7th of March, 1882, he registered in the name of his firm, the trade-mark No. 26,235.

Both these trade-marks were registered in consequence of instructions received by *Burroughs & Co.* from the firm of *McKesson & Robbins*, and they were intended to be used, and were in fact used, by *Burroughs & Co.*, as the agents of *McKesson & Robbins*, upon certain goods of theirs, of which *Burroughs & Co.* had the exclusive sale in this country.

CHITTY, J.

1886

*In re* WELLCOME'S TRADE-MARK.

*In re* BURROUGHS, WELLCOME & CO.'S TRADE-MARK.

On the 12th of December, 1882, *H. S. Wellcome* executed a declaration of trust whereby he declared that the two trade-marks were held by him in trust for the firm of *McKesson & Robbins.*

By an indenture dated the 27th of August, 1884, and made between *H. S. Wellcome* of the first part, *S. M. Burroughs* and *H. S. Wellcome* of the second part, and *John McKesson* and *Daniel Cock Robbins*, carrying on business in partnership under the style or firm of *McKesson & Robbins* of the third part, *H. S. Wellcome* assigned the trade-mark No. 22,389, and he and *Burroughs* assigned the trade-mark No. 26,235, to *McKesson & Robbins*, but this deed did not purport to deal with anything but the trade-marks.

From the 1st of May, 1880, to the 1st of December, 1884, the firm of *McKesson & Robbins* consisted of *John McKesson, Daniel Cock Robbins, John McKesson* the younger, *W. H. Wickham*, and *C. A. Robbins*, and the registration of the trade-marks as above mentioned were on behalf of these persons.

On the 1st of December, 1884, *John McKesson* retired from the firm, and the business was continued and carried on by the other partners in the firm until the 1st of December, 1885. On the retirement of *John McKesson* he executed an assignment, dated the 1st of December, 1884, of all his interest in the firm of *McKesson & Robbins*, and in the business and goodwill thereof, including the above-mentioned trade-marks, to *D. C. Robbins, J. McKesson* the younger, *W. H. Wickham*, and *C. A. Robbins.*

On the 1st of December, 1885, *C. A. Robbins* retired from the firm, and *W. L. Vennard, G. C. McKesson*, and *H. D. Robbins* became members thereof jointly with *D. C. Robbins, W. H. Wickham*, and *John McKesson* the younger, but no transfer or assignment was executed on the retirement of *C. A. Robbins.*

On the 4th of January, 1886, *D. C. Robbins, W. H. Wickham, John McKesson* the younger, and *C. A. Robbins*, served on *H. S. Wellcome*, on *Burroughs, Wellcome, & Co.*, and on the Comptroller-General of Patents, Designs, and Trade-marks a notice of motion to rectify the register of trade-marks by removing the names of *H. S. Wellcome* and of *Burroughs* and *Wellcome* as the respective owners of the above-mentioned trade-marks, and by entering the names of the applicants as proprietors thereof.

The above notice of motion was founded on the case of *In re Rust & Co.'s Trade-mark* (1), but the decision of the Court of Appeal in *Re Riviere's Trade-mark* (2) having been referred to on the opening of the motion, the applicants asked for and obtained leave to amend their notice of motion by making it a motion under sect. 78 of the *Patents, Designs, and Trade-marks Act*, 1883, by *D. C. Robbins, J. McKesson* the younger, *W. H. Wickham, C. A. Robbins, W. L. Vennard, G. C. McKesson*, and *H. D. Robbins*, that proper notice of the assignments of the 27th of August, 1884, and the 1st of December, 1884, might be entered on the register, and that the persons entitled under the last-mentioned assignment might be entered on the register as the present proprietors of the two trade-marks.

Sect. 70 of the *Patents, Designs, and Trade-marks Act*, 1883, is as follows: "A trade-mark, when registered, shall be assigned and transmitted only in connexion with the goodwill of the business concerned in the particular goods or classes of goods for which it has been registered, and shall be determinable with that goodwill."

*Romer*, Q.C., and *Northmore Lawrence*, in support of the motion:—

The marks have only been used in connection with the goodwill of the business which belonged to the applicants. The proper course is to treat the assignments of August and December, 1884, as valid assignments made in connection with the goodwill of the business, as in *In re Farina's Trade-marks* (3).

*Stirling*, for the Comptroller-General:—

In the case cited on the other side the assignment was by the administrator of a testator who had an assignable interest, but in this case the difficulty arises from the fact that the persons whose names appear on the register have never had any interest in the goodwill of the business assigned. In *In re Marler's Trade-mark* (4), in which case the trade-mark had been wrongfully registered in the name of a person who had no interest in the

(1) 29 W. R. 393.
(2) 53 L. T. (N.S.) 237.
(3) 29 W. R. 391.
(4) Ibid. 392.

CHITTY, J. 1886 *In re* WELLCOME'S TRADE-MARK. *In re* BURROUGHS, WELLCOME & CO.'S TRADE-MARK.

goodwill of the business to which the trade-mark related, the Master of the Rolls (Sir *G. Jessel*), declined to accede to the application of the true owners to have their names placed on the register without the formalities of a new registration.

CHITTY, J. :—

This question relates to the assignment of certain trade-marks. The 70th section of the Act of 1883 enacts, in terms similar to those of the 2nd section of the repealed Act of 1875, that a trade-mark when registered shall be assigned and transmitted only in connection with the goodwill of the business concerning any particular goods or classes of goods for which it has been registered.

The circumstances are these. *McKesson & Robbins* carried on a business in *New York* and also in *England*, and their agents in *England* were Messrs. *Burroughs & Wellcome*, and *Burroughs & Wellcome* registered the trade-marks in question in the name of the firm as to one, and as to the other in the name of one of the partners of their firm. The trade-marks in point of fact have always been used in connection solely with the business of *McKesson & Robbins* carried on here by their agents, Messrs. *Burroughs & Wellcome*. *Burroughs & Wellcome* did not register the trade-marks in the manner I have mentioned, wrongfully, that is to say, with the intention to appropriate the trade-marks to their own use, or to the use of the member of the firm in whose name one of the trade-marks was registered, but they registered them, I am satisfied, upon the evidence, for the benefit of *McKesson & Robbins*.

The trade-marks, as I have said, have always been used in connection with the goodwill of the business thus carried on in *England*, really by *McKesson & Robbins*, by their agents. As agents, Messrs. *Burroughs & Wellcome* had no interest in the goodwill. They had, of course, an interest in the business in this sense, that they were getting a commission for their work and labour, and as agents generally, but they had no interest in the goodwill itself.

The question is whether, under such circumstances, *McKesson & Robbins* ought to be put to making a new application, and thus giving notice to the public by means of advertisement, or whether they can rely upon the assignments which have been executed. The further facts are these. *Burroughs & Wellcome*

have executed, first, a declaration of trust which, for the purposes of the registration in question, forms no link in the title. But they subsequently executed an assignment, namely, in August, 1884, to certain persons through whom the applicants now claim.

There is a subsidiary point, which I will not mention as any part of my judgment. I will treat it for the purpose of the judgment as if the assignees were the applicants. I am satisfied it would be too narrow a construction of the section to read it as if the assignment of the trade-marks must be contemporaneous with the assignment of the goodwill. That seems to me to be far too narrow a construction to adopt. But the point remains whether there must not have been some assignment of the goodwill, and an assignment of the goodwill from the person who is the registered proprietor of the trade-mark.

It appears to me that if I accede to the application I shall not be inflicting on the public any injury within the fair meaning and scope of the Act of Parliament, because I think that this goodwill having always belonged to the applicants, and the registration having been by their agents and for the benefit of the firm of *McKesson & Robbins* only, that the case does fairly come within the words of the section, and that the assignment really is only in connection with the goodwill of the business. The section does not say in terms that the goodwill must have been assigned, certainly, as I have said, it does not say that it is to be assigned by any contemporaneous instrument. It appears to me that what is now asked for at the Bar is in substance within the scope of this section, because the goodwill of the business has always been vested in the persons who are now applying. I am not in this part of the judgment speaking of any subsequent variations which have taken place in the partnership in *New York*. I think my decision falls within the principle of the decision of the Master of the Rolls in *In re Farina's Trade-marks* (1). The Master of the Rolls considered that case a difficult one, but I am satisfied he would not have adopted the narrow construction to which I have referred, and that he would not have considered that to be a difficult point at all, namely, that by the Act there must have been a contemporaneous or a

(1) 29 W. R. 391, 393.

CHITTY, J. 1886 *In re* WELLCOME'S TRADE-MARK. *In re* BURROUGHS, WELLCOME & Co.'s TRADE-MARK.

nearly contemporaneous assignment of the goodwill of the trade-mark. But the difficulty which he appears to have felt arose from the fact that the trade-mark, which belonged to the firm, had been registered in the name of one of the partners; and he said in giving his judgment, "On the whole, taking into consideration the fact that the applicants are already entitled to the whole of the goodwill of the business with which the trade-marks have always been used, I think that the course suggested by Mr. *Rigby* may be adopted." He had before him the case of a death, and it had been suggested that administration should be taken out in this country to the estate of Mr. *Farina*, who was dead, and that there should be an assignment of the trade-marks by the administrator. The passage which I have just read appears to me in principle really to cover this case. However that may be, I decide the case upon my own view of the section of the Act of Parliament, and I have given this explanation for the purpose of shewing that I think Sir *George Jessel's* opinion would have been the same; but I am satisfied that his opinion was not adverse to the conclusion at which I have arrived.

In *In re Marler's Trade-mark* (1), as well as I can gather the facts from the report and the shorthand notes which Mr. *Stirling* has cited to me, Sir *George Jessel* appears on the facts to have come to the conclusion that *Marler* had registered wrongfully in the sense of intending to keep (and I have known many cases of this kind), the trade-mark for his own business. There have been several cases before me where the agent of a foreign principal carrying on the business for the benefit of the foreign principal, has registered the trade-mark with a view of getting the trade-mark for his own benefit. It has been a wrongful act; he has done that because he thinks in that way to make his agency more permanent than it otherwise would be, and to cause difficulty to his foreign principals in terminating the agency. *Marler*, according to Sir *George Jessel's* view, intending to appropriate (I am paraphrasing his words) the trade-mark for his own benefit, registered it so that the registration was never a registration in connection with the English business at all. That distinguishes the case from the one before me.

(1) 29 W. R. 392.

I think this case falls within the scope of the section. I am satisfied that I do no injury to the public, and therefore I make the order in the form now asked. There have been subsequent transmissions and alterations in the membership of the firm, and all that my order will go to will be to direct the registration of the assignments of the 27th of August, 1884, and of the 1st of December, 1884. That will leave on the register the persons who are shewn to be the assigns upon the result of those two deeds. In order to get registration in favour of the present apparent owners of the business, it will be necessary that some further deed should be produced to the Comptroller in the regular course. The applicants must pay the costs of the Comptroller.

Solicitors: *Hollams, Son, & Coward; Solicitors to the Board of Trade.*

G. M.

NORTH, J.

1886

March 13.

## DAVIES *v.* WRIGHT.

[1885 D. 2376.]

*Mortgage—Foreclosure Action—Order for Sale—Conduct of Sale—Security for Costs of Sale—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 25.

An action having been brought to foreclose an equitable mortgage, the Plaintiff at the hearing asked for a sale. The Defendants did not oppose this, but they wished to have the conduct of the sale. The parties left it to the Judge to decide who should have the conduct:—

*Held*, that the Defendants ought to have the conduct, because it was most to their interest to obtain the best possible price for the property.

*Held*, also, that, inasmuch as the Defendants alone would be liable for the costs of the sale, there was no reason for requiring them to give security for the costs.

*Woolley* v. *Colman* (1) not followed as to such security.

Ordered, that the sale should take place out of Court, and that the proceeds of sale should be paid into Court.

THIS was the hearing of a foreclosure action.

The Plaintiff was an equitable mortgagee by deposit of title deeds. He asked for a sale of the property out of Court. The only question between the parties was, who was to have the conduct of the sale, and they had agreed to leave that question to be decided by the Judge without argument.

*F. T. Procter*, for the Plaintiff, mentioned *Woolley* v. *Colman* (1) and sect. 25 of the *Conveyancing Act*, 1881, as bearing on the subject of security for the costs of the sale.

*Bardswell*, for the Defendants.

NORTH, J.:—

I am not sure that *Woolley* v. *Colman* is exactly in point, because in that case the mortgagor was the Plaintiff. But, as the parties have agreed to leave the matter to me, I will give the conduct of the sale to the Defendants; it is more to their interest that the best price should be obtained. I do not, however, see any reason why a mortgagor, who is going to sell himself, should

(1) 21 Ch. D. 169.

give security for the costs of the sale. He will have to pay the costs, and the mortgagee's security will not be affected. If the mortgagor was insisting on the mortgagee's selling instead of foreclosing, I could understand his being required to give security for the costs; the mortgagee's security might be insufficient. The reserved price will be fixed in Chambers. The sale may be out of Court, but the purchase-money must be paid into Court.

Solicitors for the Plaintiff: *Cole & Jackson.*
Solicitors for the Defendants: *Burton, Yeates, & Co.*

W. L. C.

---

## *In re* FINDLAY (AN INFANT).



*Infant — Maintenance — Appointment of Guardian — Appointment of new Trustee — Vesting Order — Legacy to Infant invested in sole Name of Infant — Declaring Infant Trustee — Trustee Act*, 1850 (13 & 14 *Vict. c.* 60), *s.* 2 [*Revised Ed. Statutes, vol. x., p.* 982] — *Trustee Extension Act*, 1852 (15 & 16 *Vict. c.* 55), *s.* 3 [*Revised Ed. Statutes, vol. xi., p.* 326]; 11 *Geo.* 4 & 1 *Will.* 4, *c.* 65 [*Revised Ed. Statutes, vol. vi., p.* 815].

Under the will of her father (a domiciled Scotchman, who made his will in the Scotch form), an infant was entitled to a legacy. The will contained no express trust for maintenance. The Court of Session in *Scotland* appointed a *curator bonis* to the infant, who received the legacy, and invested it in the purchase of some *New Zealand* Stock, in the sole name of the infant. This stock was transferable at the *Bank of England*. It was the only property of the infant, and the income derived from it was not sufficient to provide for her maintenance and education. The Court of Session authorized the *curator bonis* to advance from time to time sums out of capital, not exceeding in all £100, for the purpose of supplementing the income of the infant, and enabling her to be placed at a suitable school.

The *curator bonis*, as next friend, presented a petition, asking that the right to transfer £100 of the *New Zealand* Stock might vest in him, and that he might be at liberty to sell and transfer the same, and to apply the proceeds in or towards the maintenance or education of the infant; that the dividends which had accrued, and which might, during the minority of the infant, accrue on the stock, or on the residue thereof after the transfer, might be paid to him, he undertaking to apply them in or towards the maintenance or education of the infant; and that he might be appointed guardian:—

*Held*, that the infant was a "trustee" of the stock, within the meaning of the *Trustee Acts*, and an order was made vesting the right to transfer

NORTH, J.

1886

*In re* FINDLAY (AN INFANT).

£100 of the stock in the next friend (who was appointed guardian to the infant), and liberty was given to him to sell and transfer the same, and to apply the proceeds in or towards the maintenance or education of the infant; and that the dividends, accrued and to accrue during the minority of the infant, should be paid to the guardian, he undertaking to apply them in or towards her maintenance or education.

*Gardner* v. *Cowles* (1) followed.

THIS was a petition entitled in the matter of *Christina M. J. W. Stewart Findlay*, an infant; and in the matters of the Act 11 Geo. 4 & 1 Will. 4, c. 65; the *Trustee Act*, 1850; and the *Trustee Extension Act* of 1852 (15 & 16 Vict. c. 55).

The petition was presented by the infant, by *W. A. Wood* as her next friend.

*William Findlay*, the father of the infant, died on the 26th of October, 1871, being then domiciled in *Scotland*. He left a holograph settlement in the Scotch form, by which he assigned and conveyed to and in favour of his wife *Jane Findlay*, in case she should survive him, the whole household furniture and plenishing of every description that might belong to him at the time of his death, as also her liferent interest of the lands of *Highgate* and *Waulkmill*, and to the children procreated of the marriage between him and the said *Jane Findlay* after the youngest had been educated, equally between them, share and share alike. And he thereby nominated and appointed the said *Jane Findlay*, the Rev. *John Brown*, and *J. M. Morrison*, and the survivor of them, to be tutors and curators, or tutor and curator, to his children during their respective pupillarity and minority. The testator left his said wife and three children, viz. *George B. G. Findlay*, *Janet R. Findlay*, and the Petitioner, him surviving. The widow died on the 24th of May, 1877. *J. M. Morrison* died on the 22nd of January, 1881. At the time when the petition was presented *George R. G. Findlay* and *Janet R. Findlay* had respectively attained twenty-one. The Petitioner was still an infant. The Rev. *J. Brown* had declined to act as her curator, and he was dead. By an order of the Court of Session at *Edinburgh*, dated the 20th of May, 1884, made on the petition of the infant, with the concurrence of her brother and sister, *W. A. Wood* was appointed *curator bonis* to the infant. After his appointment as *curator bonis*, *Wood* received the moneys to which

(1) 3 Ch. D. 304.

the infant became entitled under the settlement, and invested them in the purchase of the sum of £1300 *New Zealand* Consolidated 4 per cent. Stock, which was transferred into the sole name of the infant, and that sum of stock was her only property. The income produced by it was not sufficient to pay for her maintenance and education, and, upon the application of *Wood* as *curator bonis*, the Court of Session on the 27th of January, 1885, authorized him to advance from time to time sums out of capital, not exceeding in all £100, for the purpose of supplementing the income of the infant and enabling her to be placed at a suitable school.

The petition asked that the right to transfer £100 stock, part of the £1300 *New Zealand* stock, standing in the books of the *Bank of England*, might vest in *Wood*, and that he might be at liberty to sell and transfer the same, and apply the proceeds in or towards the maintenance or education of the infant; that the dividends which had accrued, and which might, during the minority of the infant, accrue, on the stock, or on the residue thereof, after the transfer, might be paid to *Wood*, as the *curator bonis* or guardian of the infant, he undertaking to apply the same in or towards the maintenance or education of the infant, and that *Wood* might be appointed guardian of the infant; and that the costs of the application, as between solicitor and client, might be paid by *Wood* out of the capital moneys and dividends to be received by him under or by virtue of the order to be made on the petition.

*Methold*, for the Petitioner:—

The Court has power under sect. 3 (1) of the *Trustee Extension Act*, 1852, to make the vesting order. Such an order was made in *Gardner* v. *Cowles* (2). In that case a testator had bequeathed

(1) Sect. 3: "When any infant shall be solely entitled to any stock upon any trust, it shall be lawful for the Court of Chancery to make an order vesting in any person or persons the right to transfer such stock, or to receive the dividends or income thereof."

Sect. 2 of the *Trustee Act*, 1850, provides that the words "trust" and "trustee" "shall extend to and include cases where the trustee has some beneficial estate or interest in the subject of the trust."

(2) 3 Ch. D. 304.

NORTH, J. 1886 *In re* FINDLAY (AN INFANT).

a legacy of £1000 to each of his children, and had directed his executors to stand possessed of the residue of his estate on trust for all his children, the shares of such of them as were under twenty-one to be invested in the names of his executors in consols, and paid to the children at twenty-one or marriage. The will contained trusts for the maintenance and education of the children who should he under twenty-one, and for the accumulation of the surplus for their benefit. The executors invested the legacies and the shares of two infant daughters in the joint names of themselves and the infants respectively. Both the executors died, and Vice-Chancellor *Hall* made an order vesting the right to transfer the stock in the administratrix of the last surviving executor. *Sanders* v. *Homer* (1) and *In re Harwood* (2) are also in point. In *Re Westwood* (3) money to which an infant was entitled absolutely under a will was invested by the executor in consols, in the joint names of himself and the infant. The executor having died, Vice-Chancellor *Stuart* declared the infant a trustee of the stock, and appointed the executors of the executor to transfer it into Court, and ordered the dividends to be paid to the infant's guardian. This order was afterwards discharged on the application of the *Bank of England*, on the ground that the infant, being absolutely entitled to the stock, could not be a trustee of it within the meaning of the Act, and an order was made under the Act 11 Geo. 4 & 1 Will. 4, c. 65, for payment of the dividends to the infant's guardians. But, as in that case, there was no application to sell any part of the consols, and all that was wanted was an order for the payment of the dividends to the guardians, a vesting order was not really required, and there was no necessity for declaring the infant a trustee. Probably, therefore, the point was not seriously argued. *Re Westwood* was cited in *Gardner* v. *Cowles* (4), and nevertheless the vesting order was made.

NORTH, J. :—

I think I may make the order asked for, though I am not sure whether the Bank may not object to act on it. *Gardner* v.

(1) 25 Beav. 467.
(2) 20 Ch. D. 536.
(3) 6 N. R. 61, 316.
(4) 3 Ch. D. 304.

*Cowles* (1) is an authority directly in point, subject to this difference, that there the will contained a clear trust for the maintenance of the infant, which gave her some interest as trustee. In the present case the will does not contain any words clearly corresponding to those in *Gardner* v. *Cowles*, but the order of the Scotch Court seems to me to have put a construction on the will which gives it the same effect as if an express trust for maintenance had been found in it. I think the decision of the Scotch Court, whether it was founded on their construction of the will or on their inherent jurisdiction, makes the case sufficiently like *Gardner* v. *Cowles* to justify me in following it. I will appoint Mr. *Wood* guardian, and declare the infant a trustee, and make the vesting order as asked.

Solicitors: *Travers Smith & Braithwaite.*

W. L. C.

---

## DAVIES *v.* HODGSON.



[1885 D. 1867.]

*Appointment of new Trustees—Appointment of existing Trustees in place of themselves and an absconding bankrupt Trustee—Trustee Act*, 1850 (13 & 14 *Vict. c.* 60), *ss.* 32, 34 [*Revised Ed. Statutes, vol. x., p.* 990].

One of the four trustees of a settlement having been adjudicated a bankrupt and having absconded, an action was brought by one of the *cestuis que trust* against the other three trustees, claiming to have the trusts carried into execution, and to have it declared that the Defendants were bound to make good any loss which might accrue on three mortgages on which part of the trust funds had been invested, and which the Plaintiff alleged to be insufficient securities. He also alleged that the fourth trustee had acted fraudulently. The legal estate in the mortgaged properties was vested in all the four trustees, and the stocks, in which the remainder of the trust funds had been invested, stood in the names of the four trustees. Before issue was joined in the action the Defendants, in pursuance of an order of the Court, gave notice to call in two of the mortgages, and one of the notices had expired. Owing to the pendency of the action no one could be found willing to accept the trusts in place of the bankrupt:—

*Held*, that under these circumstances, the Court could properly appoint the Defendants trustees in the place of themselves and the bankrupt.

An order was accordingly made appointing the Defendants, and vesting

(1) 3 Ch. D. 304.

NORTH, J.

1886

DAVIES v. HODGSON.

in them the mortgaged properties, and the right to sue for and receive the mortgage debts, and to call for a transfer of, and to transfer, the stocks into their own names, and to receive the dividends thereon, the Defendants to pay into Court the mortgage money when received.

THIS action was brought by one of the *cestuis que trustent* under a voluntary settlement, dated the 5th of June, 1873, made by the Rev. *S. R. Davies* for the benefit of himself and his children, against *C. H. Hodgson*, *R. D. Bristow*, and *H. Woodward*, who, with *Evan Vaughan*, were the trustees of the settlement. In July, 1885, *Vaughan* was adjudicated a bankrupt and absconded, and he had not since been heard of. The trust funds consisted of three sums of money invested on three mortgages; a sum of *India* 4 per cent. Stock; and a sum of *North British Railway* Preference Stock. The Plaintiff alleged that the mortgage debts were insufficiently secured, and in particular that *Vaughan* had been guilty of great fraud as trustee. The legal estates in the mortgaged properties were vested in the four trustees, and the two sums of stock stood in their names. The settlement contained a power of appointing new trustees, and provided that upon every or any such appointment the number of trustees might be augmented or reduced. The Plaintiff claimed to have the trusts of the settlement carried into execution under the direction of the Court, and a declaration that the Defendants were bound to make good any loss which should accrue to the trust estate on the three mortgages.

The writ was issued on the 26th of August, 1885.

The Defendants had delivered statements of defence, but issue had not yet been joined. On the 21st of December, 1885, an order was made in the action that the Defendants should be at liberty to call in two of the mortgages. After the making of that order the Defendants gave notice to call in those two mortgages. One of those notices would expire in June, 1886. The other notice had already expired, and the mortgagor was ready and prepared to pay the principal and interest, but the legal estate could not be reconveyed to him by reason of the absence of *Vaughan*.

This petition was presented in the action by the Defendants

(with the leave of the Court), praying that they might be appointed trustees of the settlement in the place of *Vaughan* and themselves; that the mortgaged properties, and the right to sue for and receive the principal sums secured thereon respectively, might thereupon vest in the Petitioners, for all the estate of themselves and *Vaughan* therein; and that the right to call for a transfer of, and to transfer, the two sums of stock into their own names, and to receive the dividends thereon, might vest in the Petitioners. The petition stated that, having regard to the pendency of the action, no person could be found willing to accept the trusts of the settlement in the place of *Vaughan*. The Petitioners submitted to deal with any moneys or property which should be vested in them under the order to be made on the petition in such manner as the Court might direct.

The petition was entitled also in the matter of the trusts of the settlement and in the matter of the *Trustee Acts*.

*Barber*, Q.C., and *H. Fellows*, for the Petitioners:—

The practice, no doubt, is now settled that the Court will not generally, when a trust is continuing, appoint some of the existing trustees to be the sole trustees; in other words, discharge a trustee without appointing a new trustee in his place: *In re Martyn* (1); *In re Lamb's Trusts* (2). But the circumstances of the present case are very peculiar. The continuing trust is being carried out under the direction of the Court, and the object of this application is to bring the trust funds home. The mortgage money which is now ready to be paid off may be lost if the Petitioners cannot give a receipt for it and reconvey the mortgaged property. Under the circumstances it is practically impossible to obtain a new trustee in the place of *Vaughan*. The Petitioners are willing to undertake to pay the money into Court as soon as they receive it. The settlement gives power to augment or reduce the number of trustees.

*Renshaw*, for some of the *cestuis que trust*.

(1) 26 Ch. D. 745. (2) 28 Ch. D. 77.

NORTH, J. NORTH, J.:—

1886

DAVIES v. HODGSON.

Under the exceptional circumstances of this case I think I may make the order. But the Petitioners must undertake to pay the mortgage money into Court when they receive it, and to transfer the stocks into Court.

Solicitors for Petitioners: *Ravenscroft, Hills, & Woodward.*
Solicitor for Respondents: *C. H. Hodgson.*

W. L. C.

PEARSON, J.
1886
March 16, 17, 18.

## *In re* COLLINS. COLLINS *v.* COLLINS.

[1885 C. 5723.]

*Accumulation—Maintenance.*

A testator directed the income of his real and personal estate to be accumulated for twenty-one years, and gave the accumulated estates to his sister *J. C.* for life, then to her son *W.* for life, and after his decease to his children in tail male, and then to her son *J.* for life, and then to her son *A.* in tail male.

The Court directed an annual sum to be paid to *J. C.* out of the income of the personal estate for the maintenance and education of her three sons.

*Havelock* v. *Havelock* (1) followed.

*THOMAS COLLINS*, deceased, late of *Knaresborough*, by his will, dated the 30th of July, 1884, appointed his cousin, *Francis Collins*, and his sisters, *Katherine Collins* and *Jane Collins* (a widow), as trustees and co-executors. After a declaration that he was banker to his brother and sisters in respect of specified sums of money, his will proceeded in the following terms:—

"I give, devise, and bequeath to my cousin *Francis Collins* all that my dwelling-house at *Knaresborough* aforesaid in which I now reside, with all rights, members, and appurtenances thereto belonging, and also all the rents and profits of the cottages adjoining, for and during the term of his natural life, and I allow my said cousin *Francis Collins* to charge the rest of my estate during that period with the payment of the sum of £1000 a year, to be paid to him by my executors quarterly, and from and after the decease of the said *Francis Collins* then I give and devise the said dwelling-house and cottages and £1000 a year to my sister, *Jane Collins*, and at her decease I give and devise the same estate to my nephew *William Collins*, and at the death of the said *William Collins* without male issue, then I give and devise the same to my nephew *James Collins*, and at the death of the said *James Collins* without male issue, then I give and devise the same to my nephew *Archibald Collins*. I direct my executors to invest the spare capital arising from the interest of spare money in

(1) 17 Ch. D. 807.

PEARSON, J. 1886 *In re* COLLINS. COLLINS *v.* COLLINS.

securities in land within five miles of *Knaresborough*, or in stocks of the same quality as those in which such moneys are now invested, giving a preference to land securities. I give and devise all the rest, residue, and remainder of my real and personal estate whatsoever and wheresoever, unto my said trustees upon trust that my trustees shall receive the rents and profits of and manage my real and personal estates and every part thereof as they may think proper, and I desire my said trustees to invest in their own names the surplus income arising from my real and personal estates not otherwise bequeathed, such investments to be brought within the period limited for such investments, and when such period has been reached, then I devise and bequeath all such last mentioned real and personal estate to my sister *Jane Collins* for and during her natural life, and from and after her decease then I give and devise the same to my nephew *William Collins* for life, and after his decease to his children in tail male, and then I devise the same to my nephew *James* for life, and then to *Archibald* in tail male respectively. I devise all estates vested in me, as a trustee or mortgagee, unto my trustees, subject to the trusts and equities affecting the same, but so that the money secured by any mortgage shall form part of my personal estate; I leave to the occupier for the time being of my said dwelling-house the free use of all the furniture and other effects therein contained."

The testator's sister, *Jane Collins*, had eight children, namely, five daughters, of the respective ages of twenty-four, twenty-three, twenty-two, fourteen and twelve, all of whom were unmarried and dependent upon her, and three sons, all of whom were under age, and dependent upon their mother, the testator's nephews mentioned in his will as *William*, *James*, and *Archibald Collins*. The eldest, *William Collins*, was in his twenty-first year, he was being educated at the University of *Oxford*, and desirous of entering a cavalry regiment; her second son was in his nineteenth year, and her third in his seventeenth year. She was testamentary guardian of her children.

This was an originating summons in which *William Collins*, *James Collins*, and *Archibald Collins*, suing by their mother as next friend, were Plaintiffs, and the executor and executrix of the

testator's will, other than *Jane Collins*, were Defendants, to have an allowance of £2000 a year paid by the executors out of the income of the testator's residuary estate to *Jane Collins* for the maintenance and education of her three sons.

PEARSON, J. 1886 *In re* COLLINS. COLLINS *v.* COLLINS.

The income of the testator's residuary estate, including the annuity of £1000 charged upon it, was about £6000, of which £3800 was derived from personal estate. Portions of his real estate were copyhold of two manors, in both of which the custom disallows estates tail. *Jane Collins* had an income of about £1000 a year, derived from property which would after her death devolve upon her children. *Francis Collins* had conveyed the testator's house at *Knaresborough*, and the cottages adjoining, to *Jane Collins*, her brother and sisters. Her brother and sisters allowed her the use of the house; it was very large and out of repair.

*Everitt*, Q.C., and *Vaughan Hawkins*, for the application:—

This is a case in which the principle acted on in the cases of *Havelock* v. *Havelock* (1); *Revel* v. *Watkinson* (2); *Burges* v. *Mawbey* (3), applies; viz., that the Court will presume that the testator must intend that the person he wished ultimately to benefit should not starve, and should in the meantime receive such maintenance and education as would enable him to take the position intended for him. It is for the benefit of the applicants that their mother should have sufficient income to maintain and educate and advance her whole family. If necessary, some order can be made charging the allowance on the interest of the applicants, as was done in the case of *In re Colgan* (4).

*Charles Browne*, for the Trustees:—

We are bound to submit whether the allowance asked is not somewhat large.

PEARSON, J.:—

The question which arises on this summons is a question which has been the subject of discussion in a great many cases both in

(1) 17 Ch. D. 807.
(2) 1 Ves. Sen. 93.
(3) T. & R. 167.
(4) 19 Ch. D. 305.

PEARSON, J. 1886 In re COLLINS. COLLINS v. COLLINS.

early times and more particularly during the last twenty years. The leading case now on the subject is the decision of Vice-Chancellor *Malins* in *Havelock* v. *Havelock* (1). The ground of the decision I take to be, that where a testator has made a provision for a family, using that word in the ordinary sense in which we take the word, that is the children of a particular *stirps* in succession or otherwise, but has postponed the enjoyment, either for a particular purpose or generally for the increase of the estate, it is assumed that he did not intend that these children should be left unprovided for or in a state of such moderate means that they should not be educated properly for the position and fortune which he designs them to have, and the Court has accordingly found from the earliest time that where an heir-at-law is unprovided for, maintenance ought to be provided for him. Lord *Hardwicke* (2) has extended that to the case of a tenant for life, and the decision of Lord *Hardwicke* has been accepted and followed by the most distinguished Judges. Vice-Chancellor *Malins* acted upon it in *Havelock* v. *Havelock*, and I do not think that in any Court that decision has since been found fault with. It was thought at the time, I remember, that the decision was a very strong one. The circumstances were very peculiar, and I myself always thought there was more to be said in favour of the decision on the particular words of the will than in other cases. Nevertheless, I think the principle is a sound one, and even if it was a new principle, so far as the facts of that case were concerned, I think it a principle which may very well be followed. To my mind, with all the experience I have of these trusts for accumulation, I think they are mischievous. Under the circumstances I shall make the order asked. It is said on the part of the trustees, very properly, that £2000 is a large sum; but, having regard to all the circumstances, the number of members of the family (which the Court always considers), having regard to the income of the property, having regard to the present income of the lady, the mother of the children, and who will herself be entitled for life if she survives the twenty-one years, I do not think £2000 a year an improper sum to allow, because the income to which the beneficiaries will

(1) 17 Ch. D. 807. (2) *Revel* v. *Watkinson*, 1 Ves. Sen. 93.

be ultimately entitled will, as I am told, be from £8000 to £10,000 a year. I rather prefer to think it will be the lower sum, but even if it will be only one half that estimate—£4000 or £5000 a year, it is plain that a person who is ultimately to receive such an income ought to receive that education that will fit him for the position, and he ought to be put in that position in society in which he will really be benefited by the fortune; and it is plain that to deprive the children for twenty-one years of all the income would be to make the property, when it comes to them, an injury rather than a benefit. But looking to all the limitations, and the questions that may arise thereon, on which it is not proper now to give a decision, and seeing that the youngest child, assuming his brothers dead without issue, will be absolutely entitled to the personal estate at all events, I propose to direct the trustees to pay the £2000 out of the income of the personal estate to Mrs. *Collins* for the maintenance and education of her three sons.

Solicitors: *Farrer & Co.; Paterson, Snow, Bloxam, & Kinder.*

D. P.

---

## CONSTABLE *v.* CONSTABLE.



[1871 C. 195.]

*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 8; *s.* 37—*Trustee—Heirlooms.*

A trustee with power of sale subject to the consent of another is trustee for the purposes of the *Settled Land Acts*.

A trustee of a settlement with power of sale is trustee for the purposes of the *Settled Land Acts*, including the sale of heirlooms.

THIS was a summons on the part of the tenant for life, Sir *F. A. Talbot Clifford Constable*, for the appointment of trustees of the will of the late Sir *Thomas Aston Clifford Constable*, for the purposes of the *Settled Land Acts*, 1882, 1884.

The testator died in December, 1870. His will, dated December, 1869, contained the following gifts of heirlooms:—"I give my furniture and household goods, books, pictures, prints, plate,

PEARSON, J. 1886 CONSTABLE v. CONSTABLE.

china, statuary, and articles of vertù, use, or ornament in or about my mansion-house, stables, gardens, and grounds at *Burton Constable* aforesaid, except such of them as may have been selected and taken by my said wife in virtue of the gift in that behalf made to her as aforesaid, to my said trustees upon trust that the same may be annexed to my same mansion-house and premises and kept there as heirlooms, and to be enjoyed there as such by the person or persons for the time being beneficially entitled to the same mansion-house and premises, under the limitations hereinafter contained, but so that this bequest shall be subject to an executory limitation over from time to time on the death of every or any person hereby made tenant in tail male, or in tail by purchase, who shall die under the age of twenty-one years without leaving issue inheritable in tail living at his or her death, to or in favour of the person or successive persons entitled under the next subsequent limitations."

The testator devised and appointed the bulk of his real estate, including the mansion of *Burton Constable*, to his trustees, subject to a trust to raise money in aid of his personal estate, to the use of his son (the applicant on this summons), for life. The will provided that it should be lawful for the testator's trustees, with the consent in writing of the person for the time being entitled as the beneficial tenant for life, under the limitations thereinbefore contained, to sell any part or parts of the testator's devised and appointed real estate.

The testator appointed Lord *Herries*, Sir *Robert Gerard*, and *Thomas Constable*, trustees and executors of his will. He declared that if any of them, the said Lord *Herries*, Sir *Robert Gerard*, and *Thomas Constable*, should die in his lifetime or refuse the trusts, or in case any trustee for the time being should at any time die or become incapable or unwilling to act, he empowered the surviving or continuing trustees or trustee, or if there should be none such, then the executors or administrators of the deceased trustee, or if there should be more than one deceased trustee, then the executors or administrators of the last surviving of such deceased trustees, or the refusing or retiring trustee or trustees, as the case might be, but with the consent and approbation in each case in writing of his wife during her life, and, after her decease, of the person for the

time being entitled in possession to an estate for life in tail male or general, by purchase of his devised and appointed real estate, if of the age of twenty-one, to appoint new trustees or a new trustee.

*Thomas Constable* alone proved the will. The other two trustees nominated by the testator renounced the trusts of the will. The testator's widow was alive. An action for administration of the testator's estate had been instituted, in which *Thomas Constable*, the sole trustee of the will, was Plaintiff and the tenant for life, Sir *F. A. Talbot Clifford Constable* was Defendant. The summons was taken out in that action, and in the matter of the *Settled Land Acts*, 1882, 1884.

*Everitt*, Q.C., and *Nalder*, for the summons:—

There is no trustee within the definition in sect. 2, sub-sect. 8 of the *Settled Land Act*, 1882, for the purpose of the Act, inasmuch as the trustee has not absolute power of sale under the will, nor is he a person having a power to consent to the exercise of a power of sale in some one else: *In re Duke of Newcastle's Estates* (1); *Wheelwright* v. *Walker* (2).

If the existing trustee does come within that definition so far as the settled land is concerned, yet he is not a trustee of the heirlooms for the purpose of the Act, for there is no power of sale under the will over the heirlooms: *In re Brown's Will* (3).

*Napier Higgins*, Q.C., and *Yate Lee*, for the Plaintiff.

*Stillwell*, for remaindermen.

PEARSON, J.:—

Although this Act has now been in operation for three years, I cannot say that I have any more confidence in the construction of it than I had on the first occasion when it was brought under my notice. The difficulties of it are very considerable, and until this Act has been in operation for a longer period, and the Court of Appeal has had an opportunity of deciding what is the proper construction of it, it is impossible to my mind—certainly for me,

(1) 24 Ch. D. 129. (2) 23 Ch. D. 752.
(3) 27 Ch. D. 179.

PEARSON, J. 1886 CONSTABLE v. CONSTABLE.

and probably for other Judges of first instance—to be certain what is the proper construction to be put on certain sections of this Act. Nevertheless, the case having arisen before me, it is my duty to decide it as well as I can.

This is an application by Sir *Frederick Augustus Talbot Clifford Constable*, who is the tenant for life of property, asking the Court to appoint new trustees of the settlement, who may be trustees of the settlement made by the will of his father for the purposes of this Act. Of course that can only be done if there are no trustees of the settlement within the meaning of the Act in existence at present. The question that I have to decide is whether or not that is the case.

The testator by his will appointed trustees, and he gave to those trustees a power of sale, but a power of sale with the consent of the tenant for life for the time being; and it is said that that being so, the trustees are not trustees for the purposes of this Act, because they are not trustees who can absolutely sell *ex mero motu* and without the consent of another person. I will assume at the present moment that there are two trustees under the will. The fact, however, is this. There is only one trustee at the present moment, but there is in the will, as I am informed, an ample and sufficient power for the appointment of another trustee, and there is no difficulty whatever in the way of appointing another trustee, because, as I am told, the persons who have the power to appoint are willing to exercise that power. I treat it, therefore, as if there were at the present moment two trustees of the will.

The 2nd section of the Act, sub-sect. 8, contains these words: "The persons, if any, who are for the time being, under a settlement, trustees with power of sale of settled land, or with power of consent to or approval of the exercise of such a power of sale, . . . are for purposes of this Act trustees of the settlement." It is not, therefore, necessary even that they should be trustees with a power of sale, but they may simply be trustees with power to consent or to approve of the exercise of a power of sale by somebody else. It seems to me, if I were to stop there alone, it would be exceedingly difficult to say that if they had a power of sale, with the consent of the tenant for life, they were not in as good a position as if they had the power of consenting to a sale by the

tenant for life. In both cases the consent of the trustees and of the tenant for life would be necessary to the sale.

But then there is the 56th section, which I admit is to my mind a section very difficult to construe, but upon which I nevertheless was called upon to put a construction in a former case which came before me—a case from which there has been no appeal, and which therefore I am at liberty to consider for the present purpose as not being contested; and in construing that section in *In re Duke of Newcastle's Estates* (1) I came to the conclusion that the meaning of the latter part of sub-sect. 2 was this, that in all cases now where under a settlement the trustees have an absolute power of sale they cannot exercise that power of sale without the consent of the tenant for life. If that be so, and if that construction of that sub-section is right, the result of that is this, that the persons mentioned in sub-sect. 8 of sect. 2 as trustees of the sale of settled land must mean trustees of the sale of settled land with the consent of the tenant for life, because under the 56th section, even if they had a power of sale without any consent, they cannot now exercise that power of sale except with a consent. Taking the 56th section with the words of this sub-sect. 8, it is plain to my mind that if there are trustees for sale with the consent of the tenant for life they are trustees of the sale within the meaning of this sub-section, and they are therefore trustees of the settlement.

The next question that is raised is this: although they may be trustees with power of sale of settled land, nevertheless they are not trustees with power of sale of the heirlooms, and it is the heirlooms the tenant for life wishes to sell now, and you must therefore, if you cannot find in the settlement itself that the trustees have the power to sell heirlooms, come to the Court and ask that trustees may be appointed of the heirlooms for the purpose of the Act. The sub-section says that trustees with power of sale of land shall be trustees of the settlement—the whole settlement—not a part of it, but the whole of it; and as in former times it never was the habit to give trustees the power to sell heirlooms, it was contemplated when this Act was drawn that the trustees would have a power to sell the lands, but would not have

(1) 24 Ch. D. 129.

PEARSON, J. 1886 CONSTABLE v. CONSTABLE.

the power to sell heirlooms, nevertheless they were to be trustees of the settlement. That settlement must include all provisions relating to heirlooms. It is not to my mind, therefore, or in my judgment, at all necessary that separate trustees should be appointed trustees of the heirlooms for the purposes of this Act. The trustees having power to sell land are also, if it is necessary to have such trustees in order to sell the heirlooms under the Act, trustees for that purpose of the Act.

Solicitors: *Collyer-Bristow & Co.; Bell, Stewards & May; Slaughter & Colegrave.*

D. P.

---

PEARSON, J. 1886 *March* 25, 29.

## BOND *v.* WALFORD.

[1885 B. 3683.]

*Inchoate Marriage Settlement—Cancellation.*

In contemplation of marriage, an intended wife and her father executed the engrossment of a settlement of, *inter alia*, funds to be provided by the father, and the present and after-acquired property of the intended wife. The engrossment was given into the custody of the solicitors of the intended husband; it was not executed by him or the trustees. The engagement was broken off by agreement. After the lapse of three and a half years the Court declared the engrossment void as a settlement and directed it to be given up.

IN May, 1882, a settlement, approved by the solicitors of both parties, had been engrossed in contemplation of the marriage then intended to take place between the Plaintiff and *W. H.*

The parties named in the engrossed settlement were *W. H.*, the Plaintiff, her father, and proposed trustees. It recited that *W. H.* and the Plaintiff's father had each transferred a sum of £2750 New 3 per cent. Annuities into the names of the trustees. The settlement provided a first life interest to the intended wife, a second life interest to the intended husband, and declared trusts subject to such life interests in favour of the children of the intended marriage. And it was provided that the wife's then existing and after-acquired property should be settled.

On the 5th of May, 1882, the Plaintiff and her father, believing

the marriage to be imminent, executed the engrossment and sent it to his solicitors. By them it was forwarded to the solicitors of *W. H.*, with whom it had remained ever since. It was never executed either by *W. H.* or the proposed trustees.

The Plaintiff's father also sent a cheque for £2000 to his solicitors to provide for so much of the trust fund as he was to pay for, it having been agreed between *W. H.* and himself that he should provide that sum only.

In consequence of the state of health of *W. H.* the marriage was indefinitely postponed; and shortly after the 12th of July, 1882, the engagement was broken off altogether by the consent of both parties. The Plaintiff at that time was forty years of age. *W. H.* was older, he was a widower with children. The Plaintiff was entitled to reversionary property which had since fallen into possession.

Her father died in September, 1883, having made a will in favour of his widow, since deceased, and his daughters. By a codicil dated the 1st of July, 1882, he directed that any sum which his executors might be called upon to advance or give to or for the benefit of any daughter under any settlement executed or engagements entered into by him during his lifetime in contemplation of the marriage of any such daughter should be brought into hotchpot.

This was the trial of an action to have it declared that the estate of the testator was no longer under any liability in respect of the settlement, to have the settlement declared null and void and to have the engrossment delivered up.

*Ingle Joyce*, for the Plaintiff:—

Whatever the effect of the execution by the Plaintiff and her father may be, the so-called settlement cannot affect what she gets under her father's will, for it did not belong to her at the time of the settlement, and has not come to her during any coverture.

But the document is merely an escrow: *Millership* v. *Brookes* (1); *Watkins* v. *Nash* (2); and even if it were a valid deed at law, the Plaintiff would be entitled to relief in equity, inasmuch as she

(1) 5 H. & N. 797. (2) Law Rep. 20 Eq. 262.

PEARSON, J. executed the instrument on the understanding that she would not be bound, unless it was executed by the intended husband: *Evans* v. *Bremridge* (1).

1886
BOND
v.
WALFORD.

If even the document became binding as a settlement, the parties may before the intended marriage takes place revoke it, provided they are acting *bonâ fide*, and there is no undue influence: *Robinson* v. *Dickenson* (2); *Page* v. *Horne* (3); *Macqueen* on Husband and Wife (4); *Davidson's* Conveyancing (5).

The engagement having been broken off, the marriage on which the proposed settlement was founded has been abandoned. The settlement may be treated as a nullity, as in *Essery* v. *Cowlard* (6), and cases there cited, though their particular circumstances are different.

Moreover, the provision for settlement of after-acquired property is executory and without consideration, and cannot be enforced, the executors of the father's will ought to pay the Plaintiff's share without regard to the alleged settlement. The Court should declare the instrument invalid, and if necessary direct cancellation.

*Maidlow*, for the trustees of the intended settlement:—

It is my duty to submit that the settlement was good and binding so far as the Plaintiff's own property and the £2000 intended to be provided by her father are concerned, and it is immaterial that it was never executed by the intended husband: *Essery* v. *Cowlard*; *Thomas* v. *Brennan* (7); *Jeston* v. *Key* (8).

*R. J. Parker*, for *W. H.*

*P. H. Lawrence*, for the trustees and executors of the father's will.

March 29. PEARSON, J. (after stating the facts, continued):—

If the marriage had taken place the settlement would have been binding so far as the £2000 and the covenant to settle the

(1) 8 D. M. & G. 100.
(2) 3 Russ. 399, 412.
(3) 9 Beav. 570; 11 Beav. 227, 235.
(4) 3rd Ed. p. 243 *et seq.*
(5) 2nd Ed. vol. iii., p. 10, n.
(6) 26 Ch. D. 191.
(7) 15 L. J. (Ch.) 420.
(8) Law Rep. 6 Ch. 610.

wife's property are concerned, because the settlement would have become in part executed by the marriage. There is not a great deal of authority on the subject; it is always considered a matter of difficulty how far the Court can declare a marriage settlement absolutely null and void because the marriage did not take place at the time. The case of *Page* v *Horne* (1), cited by Mr. *Ingle Joyce*, is one which contains a great deal of valuable information. The facts of the case stated shortly were that on the 14th of March, 1844, in contemplation of a marriage, a mortgage in fee belonging to the intended wife was conveyed to trustees on certain trusts for the intended wife, the intended husband, and the issue of the marriage. On the 27th of March the intended husband and wife purported to revoke the settlement. On the following day, the 28th of March, the parties married. There were no children of the marriage. The case was brought before Lord *Langdale*. The earlier authorities were cited. During the course of the argument, he says this (2):—"Suppose, after such a settlement as this, the parties had agreed not to marry, and had released each other from their engagements, and had married other persons, and had afterwards become single and then married; in such a case could the trusts of the first settlement be revived?" The fact that he put such a question shews me that there was considerable difficulty in dealing with the case. In the course of the judgment he says this:—"What is said on one side is, that persons who contract to marry, subject to certain terms as regards their property, have a right, until the marriage is solemnized, to alter those terms; that they have the power of disposing of their own property and of altering all the arrangements which have been made, and even to revoke it so effectually, as to give the property to the husband *jure mariti*. On the other hand, the trustees say, 'You vested the property in us, the deed is executed and the property is legally vested in us on certain trusts, in the event of the marriage taking place. These trusts are irrevocable; you have made this settlement in contemplation of a marriage, and if it takes place, the trusts are absolute. You may put an end to it by putting an end to the contract of marriage, but marrying as you have done, we, the trustees, must perform the

(1) 9 Beav. 570.

(2) 9 Beav. 576, 578.

PEARSON, J. 1886 BOND v. WALFORD.

trusts we have undertaken.'" On a subsequent day the Master of the Rolls says:—"All I can do in this case is, to refer it to the Master to inquire and state to the Court under what circumstances the deed of revocation was executed, with liberty to state special circumstances." When the case was finally disposed of (1), the Master of the Rolls dismissed the bill, coming to the conclusion that the lady had not been properly advised when she executed the deed of revocation. I do not think the cases in the books shew more than this. It is the duty of the Court to see that everything done is done fairly and honestly, and that an attempted revocation of a settlement is not a revocation simply because the parties desire to make different terms from what they desired at the time the settlement was executed.

In this case it seems to me the marriage contract was put an end to, and considering that now three and a half years have expired since the execution of this inchoate settlement, I think I am entitled to come to the conclusion that, even if a marriage did take place between the parties, it would take place under such different circumstances that it would be, strictly speaking, not the same marriage, but another marriage than the one then intended, and under these circumstances I ought to declare that the deed is not binding, and ought to be delivered up.

Solicitors for the trustees of the will of the Plaintiff's father: *Lee & Pemberton.*

Solicitors for all other parties: *Horne & Birkett.*

(1) 11 Beav. 227.

D. P.

PEARSON, J.

1886

April 1.

## *In re* VOWLES. O'DONOGHUE *v.* VOWLES.

[1885 V. 589.]

*Administration Action—Costs—Costs of Bankrupt Executor Debtor to Estate.*

A sole executor, who was a defendant to an administration action, became bankrupt after the administration judgment. He was a debtor to the estate in respect of money advanced to him by the testator in his lifetime:—

*Held*, that the executor must have his costs subsequently to the bankruptcy, but that his prior costs must be set off against the debt due from him.

*In re Basham* (1) followed.

THIS was the further consideration of a creditors' administration action.

The sole executor of the testator, who was a defendant, became bankrupt after the administration judgment had been pronounced. He was a debtor to the estate for £516, in respect of money which had been lent to him by the testator in his lifetime. The Plaintiffs were creditors for £153. There were no other creditors.

*Decimus Sturges*, for the Plaintiffs.

*Waggett*, for devisees:—

The executor ought not to have any costs. It is his default in paying his debt which has rendered this action necessary, and he has rendered no assistance in the action. He did not appear until after his bankruptcy: *In re Basham* (1); *McEwan* v. *Crombie* (2).

*Dunning*, for the executor:—

The executor is not strictly speaking a defaulting executor, for the debt existed before the testator's death. It is not a debt due from him in the character of executor, but an ordinary debt which is discharged by the bankruptcy. The only remedy for it now is by proof in the bankruptcy. The executor has had to bring in an account in the action; the Plaintiffs could not have

(1) 23 Ch. D. 195. (2) 25 Ch. D. 175.

PEARSON, J. 1886 *In re* VOWLES. O'DONOGHUE *v.* VOWLES.

proceeded in his absence, and he has done everything which has been required of him. Under the circumstances he is entitled to his costs since the bankruptcy. No doubt his costs before the bankruptcy must be set off against his debt: *Smith* v. *Dale* (1); *In re Basham* (2); *McEwan* v. *Crombie* (3); *In re Griffiths* (4). The estate ought not to be administered at the expense of the Defendant's solicitors. No unnecessary costs have been incurred, and the executor has in no way acted improperly.

*Waggett*, in reply:—

In *Smith* v. *Dale* the point was not argued. *In re Griffiths* was the case of an executor of a defaulting executor. The estate of the defaulting executor was the debtor to the estate of the original testator. Here the executor himself is the debtor.

PEARSON, J.:—

I must follow the decision of Mr. Justice *Chitty* in *In re Basham*, which, indeed, commends itself to my mind. In the present case the executor's debt is one which will be discharged by the bankruptcy, and the only remedy for the debt is by proof in the bankruptcy. In such a case the Court has held that after the bankruptcy the executor can no longer be regarded as a defaulting executor. He is therefore entitled to his costs since the bankruptcy, but his prior costs must be set off against his debt.

Solicitors: *Guscotte, Wadham, & Daw; Merediths, Roberts, & Mills.*

(1) 18 Ch. D. 516.
(2) 23 Ch. D. 195.
(3) 25 Ch. D. 175.
(4) 26 Ch. D. 465.

W. L. C.

PEARSON, J.
1886
April 3.

## *In re* SCHOLES & SONS.

*Solicitor—Agent—Retainer—Costs.*

*London* solicitors acting for country solicitors, duly authorized, obtained an order for taxation of costs. The names of the *London* solicitors were indorsed on the petition for taxation as principals. The order for taxation was discharged on the motion of the client without costs.

*SAMUEL RHODES CLAY*, when the sole trustee of the will of *Christopher Wharton*, employed Messrs. *Scholes & Son* as solicitors in an action in the Chancery Division, to which he as such trustee was a Defendant. *Samuel Mayman* was appointed co-trustee with him of the will. Messrs. *Scholes & Son* had in their possession documents belonging to the trust, on which they claimed a lien for the costs in the Chancery action. *Samuel Mayman* desired previously to the payment of those costs to have them taxed; and, with the knowledge and authority (as the Judge held) of *Samuel Rhodes Clay*, instructed Messrs. *Scholfield & Taylor*, solicitors, of *Batley*, to get the costs taxed; and Messrs. *Scholfield & Taylor* instructed Messrs. *Crossman, Crossman, & Prichard*, their *London* agents, to procure an order for taxation of those costs. Messrs. *Crossman, Crossman, & Prichard* accordingly obtained an order for taxation, on a petition in the name of *Samuel Rhodes Clay*. The petition was indorsed with their own name without the name of their principals, and it was not shewn on the petition that they were acting as agents.

This was a motion on the part of *Samuel Rhodes Clay* to discharge the order for taxation.

*John Cutler*, for the motion:—

If in fact there was a retainer by *Clay* to the country solicitor, that does not authorize proceedings being taken by the *London* agents as principals, and the client has an absolute right to have the proceedings cancelled: *Wray* v. *Kemp* (1); *Nurse* v. *Durnford* (2); *In re Savage* (3).

(1) 26 Ch. D. 169. (2) 13 Ch. D. 764.
(3) 15 Ch. D. 557.

PEARSON, J. 1886 In re SCHOLES & SONS.

Sir *Arthur Watson*, Q.C., for Messrs. *Crossman, Crossman, & Prichard*:—

*Clay* was perfectly well aware of the steps that were being taken, and will not be allowed to stop the taxation going on simply because of an informality in the indorsement. If necessary, the petition might be amended. In any case, this application is vexatious, and no costs will be allowed.

*John Cutler*, in reply:—

The applicant is only standing on his rights; the application is *bonâ fide*, and the order for discharge should carry costs.

PEARSON, J.:—

I must say that this motion is not creditable to the quarter from which it issues. It seems to have been decided that strictly and technically a *London* firm, acting as agents for country solicitors, ought to take all proceedings so as to shew the name of their principals. I feel myself reluctantly bound to yield to the objection taken on that ground. I should have thought that when there was no doubt as to the retainer the objection was not so formidable but that it could have been got over. But Mr. Justice *Chitty* seems to have held that a *London* agent had no right to indorse his own name on proceedings as principal, and that if he did the proceedings could be vacated by the client. Under these circumstances, I must grant the application. As to giving costs, I only regret that I cannot make the parties who have made the application pay costs.

Solicitors: *Pitman & Sons*, agents for *Scholes & Son, Dewsbury; Crossman, Crossman, & Prichard.*

B. P.

## *In re* WOOD'S TRADE-MARK. WOOD *v.* LAMBERT & BUTLER.

[1883 W. 2162.]

C. A.
1885
PEARSON, J.
*April* 27, 28, 29.
C. A.
*Dec.* 17, 18.
1886
*Jan.* 12, 13.

*Trade-mark—Trade Marks Registration Act*, 1875 (38 & 39 *Vict. c.* 91), *ss.* 3, 5, 10—"*Special and distinctive word*"—*Rectification of Register.*

A "special and distinctive word" used in the definition of a trade-mark in sect. 10 of the *Trade Marks Registration Act*, 1875, means a word which distinguishes the goods to which it is attached as goods made or sold by the owner of the mark; and by using some additional words so as to induce the general public, as distinguished from persons in the secrets of the particular trade who would not be deceived, to believe that goods so marked are of foreign brand and manufacture, the inventor of the original word is precluded from saying that such word is distinctive of his own manufacture so as to be capable of registration as his trade-mark.

In 1876 *A.* registered as his trade-mark the word "*Eton*," which had been used since 1869 and become known in the trade as denoting cigarettes of his manufacture. He had also been in the habit of selling, and supplying for the purposes of sale, "*Eton*" cigarettes in boxes so labelled (in conformity with an alleged custom in the trade) as to imply that such cigarettes were manufactured at *St. Petersburg* by a Russian firm:—

*Held* (reversing the decision of *Pearson*, J.), that *A.*, by so acting in connection with the word "*Eton*" as to suggest to persons not in the trade that the cigarettes were not of his making, had destroyed the value of the word as "special and distinctive" within the *Trade Marks Act*, 1875, s. 10, and accordingly that at the time of registration it had ceased to be his special and distinctive mark capable of registration. And as five years on the register does not (on the authorities) give an indefeasible title to a mark which, from not properly constituting a trade-mark within the meaning of the Act, ought not to have been registered, *A.'s* action to restrain an infringement of the mark by *B.* was dismissed, and rectification of the register by removing the mark on *B.'s* application allowed.

THE Plaintiffs, "*John Wood & Son*," carried on business in *London* as cigarette manufacturers and cigar importers, and for some years previously to the 1st of June, 1876, the firm, which until 1873 was styled "*John Wood*" and afterwards "*John Wood & Son*," had used in connection with cigarettes of their manufacture the words "*Eton*," "*Harrow*," "*Oxford*," "*Cambridge*," "*Zetland*," and "*Woronzoff*." On the 1st of June, 1876, on the application of the firm, the word "*Eton*" was registered under

C. A. 1886 *In re* WOOD'S TRADE-MARK. WOOD *v.* LAMBERT & BUTLER.

the *Trade Marks Registration Act*, 1875, in Class 45 as their trade-mark in respect of cigarettes and manufactured tobacco, but in consequence of the opposition of one *Mascowitch* the applications to register the other names as trade-marks were abandoned. For many years prior to 1876 *John Wood & Son* had supplied the firm of *Lambert & Butler* with cigarettes of their manufacture packed in boxes bearing the word "*Eton*" on the side or end, and also a label containing the words: "Cigarettes of the finest selected Turkish Tobacco, manufactured by *Jancal Tachta, Constantinople*," which was designed for *Lambert & Butler* and was registered by them as their trade-mark on the 29th of May, 1876.

In 1876, *Lambert & Butler* having ceased dealing with *John Wood & Son*, began to make their own cigarettes for themselves, and put them up for sale in boxes bearing the word "*Eton*" and their registered label, and continued to do this until the commencement of the action.

*John Wood & Son* had also, before the end of 1876, supplied Messrs. *Wills* of *Bristol* with cigarettes of their manufacture in boxes bearing the word "*Eton*" and nothing else. At the end of 1876 Messrs. *Wills* began to manufacture their own cigarettes and sold them, though not in large quantities, in boxes bearing the word "*Eton*" and nothing else. It appeared also that prior to 1876 *John Wood & Son* sold cigarettes of their manufacture in boxes bearing the word "*Eton*" and also the label "*St. Petersburg—P. Mavrogordato & Co.—Cigarettes.*"

On the 29th of May, 1883, the Plaintiffs commenced this action against *Lambert & Butler*, claiming an injunction to restrain them from selling cigarettes not of the Plaintiffs' manufacture under the Plaintiffs' trade-mark "*Eton*," or any colourable imitation thereof, or from otherwise infringing the exclusive right of the Plaintiffs to the use of such trade-mark, with an account and damages.

By their statement of defence and evidence the Defendants raised the case that the word "*Eton*" was not a trade-mark and had never been used as such and could not be registered as a trade-mark. They also alleged that Plaintiffs' father and his successors in business had sanctioned and authorized (if any

such sanction or authority were necessary, which Defendants denied) the use of the word "*Eton*" on goods not manufactured by them, and that the word was, and always had been, used by manufacturers and vendors of cigarettes to indicate cigarettes of a particular size only.

The Defendants also applied under the *Trade Marks Registration Act*, 1875, s. 5, to rectify the register of trade-marks by removing therefrom the trade-mark "*Eton*."

The action and the application to rectify came on to be heard before Mr. Justice *Pearson* on the 27th, 28th, and 29th of April, 1885.

*Cozens-Hardy*, Q.C., and *J. Cutler*, for the Defendants' motion to rectify the register.

*Napier Higgins*, Q.C., and *Dauney*, for the Plaintiffs:—

The evidence shews that the word "*Eton*" is understood in the trade as indicating, not only the character of the articles, but the maker of them; it has always been understood to denote cigarettes of the Plaintiffs' manufacture. *In re Palmer's Trade-mark* (1); *In re Leonard & Ellis's Trade-mark* (2); *In re Ralph's Trade-mark* (3); *Linoleum Manufacturing Company* v. *Nairn* (4), do not, therefore, apply; and after the lapse of five years the Plaintiffs are protected by sect. 3 of the *Trade Marks Act* of 1875, or by sect. 76 of the *Patents, Designs, and Trade Marks Act* of 1883. It is sufficient for us to shew that the trade will be deceived by what the Defendants are doing; it is not for us to shew that the public will be deceived: *Hirst* v. *Denham* (5); *Ford* v. *Foster* (6). The Act of 1875 has not altered the law as laid down by those cases.

*Cozens-Hardy*, Q.C., in reply upon the Defendants' motion to rectify:—

The evidence shews that the word "*Eton*" was *publici juris* at the date of the registration; it did not denote a particular manufacturer, but only a particular size of cigarette. Therefore, it

(1) 24 Ch. D. 504.
(2) 26 Ch. D. 288.
(3) 25 Ch. D. 194.
(4) 7 Ch. D. 834.
(5) Law Rep. 14 Eq. 542.
(6) Ibid. 7 Ch. 611.

C. A. 1886 — *In re* WOOD'S TRADE-MARK. — WOOD *v.* LAMBERT & BUTLER.

ought not to have been registered, and the lapse of five years does not prevent the Court from now rectifying the register. The word is not a "special and distinctive word" within sect. 10 of the Act: *In re Leonard & Ellis's Trade-mark* (1). That case extended the doctrine of *Linoleum Manufacturing Company* v. *Nairn* (2). The Plaintiffs have not in fact used the word as a trade-mark, for they allowed the Defendants and other retail dealers to put their own labels on the boxes, and thus to sell the cigarettes as of their own manufacture. The evidence proves that before 1875 at least three other firms were using the word.

Even if at the date of the registration the Plaintiffs were entitled to use the word as their trade-mark, the word has since become *publici juris*, and under sect. 5 the Court has power to remove a mark from the register if the person who is registered as the proprietor "is not for the time being entitled to the exclusive use" of it, *i.e.*, at the time when the application to rectify is made. The trade-mark may have been relinquished or abandoned since the registration by the proprietor allowing other persons to use it without interference.

[PEARSON, J.:—Possibly the Court would not grant an injunction against the persons who had been allowed to use the mark, but would that justify the Court in removing the mark from the register?]

Yes; the use of the words "for the time being entitled" shews that the Court could remove the mark in such a case.

At any rate, the Plaintiffs have come to the Court too late.

*Napier Higgins*, Q.C., in reply, upon the Plaintiffs' motion:—

The suggested construction of sect. 5 is not the true one. But sect. 90 of the *Patents, Designs, and Trade Marks Act* of 1883 now applies, as it gives the Court power to remove a mark from the register only when the entry was "made without sufficient cause."

[*Cozens-Hardy*:—Our notice of motion was given before the Act of 1883 came into operation.]

At any rate, sect. 90 is a legislative interpretation of sect. 5.

(1) 26 Ch. D. 288. (2) 7 Ch. D. 834.

The Court cannot on account of delay take away a statutory right. There must be clear evidence, or necessary implication, of an intention to abandon the right. There is no such evidence here.

PEARSON, J.:—

There are two proceedings before me in this case. The one is an action by Mr. *Wood*, trading as *John Wood & Son*, against Messrs. *Lambert & Butler*, asking for an injunction to restrain the Defendants from infringing that which the Plaintiffs allege to be their trade-mark by using the word "*Eton*," as applied to cigarettes. The other proceeding is an application by the Defendants, under the *Trade Marks Registration Act* of 1875, to remove the Plaintiffs' mark from the register of trade-marks. As I gather from the evidence, the trade in cigarettes in *England* is about thirty years old, and it is not disputed that in or about the year 1869 Mr. *Wood's* father, who was then carrying on the business of *John Wood & Son*, was the first person to apply the name "*Eton*" to a cigarette of a particular size. It appears from the evidence that a great variety of cigarettes are made in this country, and that almost every manufacturer of cigarettes uses different names to describe different sizes of cigarettes. A great number of those names which are used as denoting, more or less, the size of the cigarettes, are common to the trade. It was formerly, as I understand (and it may be still with regard to some cigarettes), the practice of the trade to make those cigarettes of Turkish tobacco, but, as I gather from the evidence, although they were made of Turkish tobacco, the different manufacturers used different brands for cigarettes made of Turkish tobacco, and, as I gather, the brands were so different that an expert in the trade, and possibly in some cases an experienced smoker, would be able to detect the difference. The list of Messrs. *John Wood & Son* contains twelve different names, of which, as I understand, at least nine are common to the trade. The Plaintiffs say that one of them, the word "*Eton*," is their own mark, and that no other person has a right to make a cigarette (of Turkish tobacco, at all events), and call it by the name of "*Eton*," because all cigarettes branded with that name on the box in which they are

C. A. 1886

*In re* WOOD'S TRADE-MARK. WOOD *v.* LAMBERT & BUTLER.

Pearson, J.

sold are well known, and have been for many years well known, in the trade as of the Plaintiffs' manufacture, and that to make cigarettes substantially of the same size as those which they make and call them "*Eton*," and to sell them in boxes with the name "*Eton*" on the outside, is to endeavour to palm off, upon the trade at all events, as of their manufacture, cigarettes which are not manufactured by them. And it is said that, even if the *Trade Marks Act* had not been passed, the Plaintiffs would be entitled to an injunction to restrain the Defendants from doing this, and that they cannot be in a worse position now than they would have been if that Act had not been passed. It is said on the other side, that the word "*Eton*," like divers other names of cigarettes, is used to denote size only, and that it does not in any way point out the manufacturer; that it was used originally by Mr. *Wood* to denote a particular size of cigarette; that it is well known in the trade as denoting that size and nothing else; and that it is a complete misapprehension to say that a box of cigarettes marked on the outside with the word "*Eton*" would be understood by the trade as meaning that those cigarettes were manufactured by Messrs. *Wood & Son*. I have to determine which of these contentions is right.

But before I do that, I must deal with the point which has been raised upon the construction of the Act. In my opinion this case comes under the Act of 1875. At all events, in so treating it, I am treating it with regard to this objection in the most beneficial way for the Defendants. The 3rd section of the Act says that "the registration of a person as first proprietor of a trade-mark shall be *primâ facie* evidence of his right to the exclusive use of such trade-mark, and shall, after the expiration of five years from the date of such registration, be conclusive evidence of his right to the exclusive use of such trade-mark, subject to the provisions of this Act as to its connexion with the goodwill of a business." I have said before, and I will repeat it now, that, whatever that section may mean, I am certain it was never intended that, in an Act passed in order to prevent frauds, any of the sections should be made use of to perpetrate fraud, and therefore I should be very slow to come to the conclusion, in any case in which the registration of a trade-mark had not been properly obtained, or

the mark ought not to be considered as really belonging to the person who claimed it, that, simply because he had been on the register for five years as the owner of the mark, the Court was prevented from considering whether he had been properly registered or not. But it is unnecessary now to enter into any discussion of sect. 3, because it is sect. 5 which is relied upon. Sect. 5 says: "If the name of any person who is not for the time being entitled to the exclusive use of a trade-mark in accordance with this Act, or otherwise in accordance with law, is entered on the register of trade-marks as a proprietor of such trade-mark . . . any person aggrieved may apply in the prescribed manner for an order of the Court that the register may be rectified." It is suggested that the words "for the time being" mean during all the period for which the mark is on the register, and that, if at any time when an application is made to the Court to remove it, it appears that at that time the mark could not be properly registered, the applicant is entitled to have the mark expunged. I do not think that that is the true meaning of this section. I think the words "for the time being" refer to the time when the registration is made. The words are "if the name of any person who is not for the time being entitled," &c., "is entered." That must be at the time when the registration is made, and I think it would be an unreasonable construction to say that the Court is to judge by the state of things existing at the time when the application to expunge is made, whether the registration was properly made at the time when it was made.

Dismissing that point I have to consider, first, whether the Plaintiffs had at the time when they registered this mark any trade-mark which they were entitled to register, and whether that registration ought now to be enforced for their benefit, or whether the mark ought to be removed from the register. The argument addressed to me on behalf of the Defendants is twofold. It is said that the word "*Eton*" never was intended to indicate the Plaintiffs' manufacture, that it was intended to designate size, and size only. It is said also that the Plaintiffs have so conducted their business with regard to this mark, as to shew that they do not use or claim it, except in this litigation, as their trade-mark; that it has been thrown broadcast to the public

C. A. 1886

*In re* WOOD'S TRADE-MARK.

WOOD *v.* LAMBERT & BUTLER.

Pearson, J.

with liberty to use it in any way they please, that the Plaintiffs cannot therefore possibly ask for the interference of the Court on the present occasion. At first I was much struck with the observations which were made in support of the Defendants' case, that the word "*Eton*" indicates size only. But, after hearing all the evidence, I have come to the conclusion that the word "*Eton*" does not mean size only, and that, although there are a great many similar words ("*Oxford*" and "*Cambridge*" for instance), which have come in the trade to designate size only, because they are used by a number of manufacturers indifferently, the word "*Eton*" has practically never been used by any manufacturer except the Plaintiffs' firm. It is said that the evidence shews that when the Plaintiffs registered this mark they were not entitled to do so, because at that time several rival manufacturers were using the name "*Eton*," and, as Mr. *Cozens-Hardy* very properly said, it would be sufficient for the Defendants to shew that three rival manufacturers were then using the word. [His Lordship read and commented upon the evidence on this point, and continued:—] On this evidence I come to the conclusion that from 1869, when Mr. *Wood*, the father, first applied this word to cigarettes, down to 1876, when the Plaintiffs registered this word as their trade-mark, the Plaintiffs' firm had been constantly making cigarettes of this particular size, employing in the manufacture of them the particular tobacco which they thought best suited for them, and selling them in boxes marked outside with the word "*Eton*," and that during all that period the trade, at all events the principal manufacturers, and the largest retail dealers in the north of *England*, had known these cigarettes as being sold in boxes with the word "*Eton*" at the end, and had understood that word as denoting that the cigarettes came from Messrs. *Wood & Son*. I think, therefore, that the Plaintiffs were entitled at that time to register this word as their trade-mark, that they had acquired a right to it which was recognised by the trade at that time, recognised indeed at the very moment when the Plaintiffs made the registration, because the opposition to the registration was either withdrawn or was unsuccessful. In either case I am of opinion that the Plaintiffs were entitled to register the mark, and that, having registered it,

they are now entitled to prevent other persons from using it for the same purpose for which they use it.

The only doubt which I have felt upon this case arose from the Plaintiffs' own dealings and transactions in the trade. It appears that, having made these cigarettes, having put them into boxes with the word "*Eton*" at the end of them, they were in the habit of supplying Messrs. *Lambert & Butler* and other persons also with them, and allowing them to put their own labels on the top of the boxes, so that, when they came into the hands of other persons, the boxes would appear with the word "*Eton*" at the end, but with a label at the top which would indicate (certainly to all persons uninitiated in the mysteries of the trade) that the cigarette within was manufactured, not by *Wood & Son*, but by the person who sold the box. At one time I thought that that ought to be almost fatal to the Plaintiffs' case. But it appears from the evidence that that is the common practice in the tobacco trade. I do not mean to defend it; I think it a reprehensible practice. The effect of it would be that any person buying the cigarettes from a retail dealer would understand that what he bought was the manufacture of the person whose label was at the top of the box, when, in fact, it was not his manufacture. But at all events this practice is well known in the trade; it would deceive no one engaged in the trade. No person in the trade buying these boxes with the word "*Eton*" at the end of them would, so far as the evidence goes, have any idea that they were other than *Wood's* cigarettes, whatever label there might be on the top of the box. Under these circumstances, I do not think that I ought to refuse to support the Plaintiffs' trade-mark.

There is this further question. The trade-mark was registered in 1876. In 1876 Messrs. *Lambert & Butler* ceased to deal with Messrs. *Wood & Son* for these cigarettes, Messrs. *Wills* also ceased to deal with them for these cigarettes, and, as I gather from the evidence, Messrs. *Lambert & Butler* (certainly Messrs. *Wills*) have since that time, to a greater or less extent, made their own cigarettes, stamped their boxes with the word "*Eton*," and sold them as "*Eton*" cigarettes. Considering that this has been done by Messrs. *Wills* down to the present time without, so far as

C. A.
1886
*In re* WOOD'S TRADE-MARK.
WOOD *v.* LAMBERT & BUTLER.
Pearson, J.

I know, any complaint being made to them by the Plaintiffs, and by Messrs. *Lambert & Butler* down to the year 1881, when Messrs. *Wood* say that they complained to Messrs. *Lambert & Butler* of what they were doing, I had some doubt whether under these circumstances I ought not to hold that Messrs. *Wood & Son* had abandoned their right to their trade-mark. If there had been evidence that from 1876 downwards the whole trade had been selling cigarettes with the word "*Eton*" on the boxes, and that, from that time down to the present, Messrs. *Wood* had not interfered, I think it would have required a great deal of argument to persuade me to interfere on their behalf. But there is evidence that several large manufacturers, who have made similar cigarettes since that time, have been careful to avoid the use of the word "*Eton*," and have sold the cigarettes under other names, and I cannot help seeing that, if I require Messrs. *Wood & Son* to know what was being done in the trade, I must also require Messrs. *Lambert & Butler* to know what was being done in the trade. If I am to suppose that Messrs. *Wood & Son* knew what was being done by Messrs. *Lambert & Butler* and Messrs. *Wills*, I must also assume that Messrs. *Lambert & Butler* and Messrs. *Wills* knew what other people in the trade had done, that they knew that Messrs. *Wood & Son* had registered their title, and that they were willing to take their chance of Messrs. *Wood & Son* raising any objection to what they were doing. Moreover, it appears that in those years the sale of these particular cigarettes has been comparatively small, and that may be a sufficient reason why Messrs. *Wood & Son* should not interfere. There may be a reason for their interfering now, because they may find that, if they do not, they may suffer more damage in their business than they at first apprehended that they would. I am not aware (indeed I think there are decisions to the contrary) that this Court requires a man to enter upon litigation at the earliest possible moment, if his abstaining from litigation will throw no additional expense upon the party against whom ultimately he proceeds, and it does not appear to me that Messrs *Lambert & Butler* have been put to any expense to which they would not have been put if Messrs. *Wood & Son* had interfered as quickly as they might have done.

Under all these circumstances I must refuse the motion to rectify the register, and I must grant the injunction.

W. L. C.

From this decision the Defendants appealed. The appeal came on for hearing on the 17th of December, 1885.

*Cozens-Hardy*, Q.C., and *J. Cutler*, in support of the appeal.

*Napier Higgins*, Q.C., and *Dauney*, for the Plaintiffs, the Respondents.

The arguments were similar to those in the Court below, and the same cases were cited, with the addition of *Edwards* v. *Dennis* (1).

LINDLEY, L.J.:—

The short history of this case appears to be that in 1869 Messrs. *Wood*, who were then one of the few firms of cigarette makers, made a variety of cigarettes, and amongst other cigarettes that they made were those called "*Eton*." They had a trade card in which they indicated by pictures and marks the cigarettes they made, and I take it in their favour, subject to the observation I shall make presently, that the word "*Eton*" denoted to the trade certainly, and possibly to the public in general, cigarettes made by them of a particular size. It seems common ground to both parties that "*Eton*" denoted a particular size. The controversy is whether it did or did not denote anything more. Messrs. *Wood* were the first certainly to make cigarettes called "*Eton*," and they made them for some years. Early in 1876 they registered the word "*Eton*" in connection with cigarettes. Having registered themselves as cigarette makers, and having registered that name, five years having elapsed, they have acquired an exclusive right to the use of that name in connection with cigarettes so long as the register remains unrectified. Upon the question of law whether the register can be rectified after five years, it appears to me that this Court, at all events, is precluded by previous decisions from saying that it cannot. The

(1) 30 Ch. D. 454.

C. A. 1886 — *In re* WOOD'S TRADE-MARK. — WOOD *v.* LAMBERT & BUTLER. — Lindley, L.J.

proper construction of sects. 3 and 5 of the *Trade Marks Act*, 1875, has been brought before the Court of Appeal, and discussed on three several occasions. First, in *In re Palmer's* (*Braided Fixed Stars*) *Trade-mark* (1); then in *In re Leonard & Ellis's Trade-mark* (2); and lastly in *Edwards* v. *Dennis* (3). Looking at those decisions and the reasons given for them, it appears to me now settled, so far as this Court can settle it at all events, that an application to rectify the register can be successfully made, notwithstanding the lapse of five years, and notwithstanding sect. 3. What is necessary to be proved in order to rectify the register depends, of course, upon the language of the Act itself. But, supposing a case to be made out to this effect: that a person who is on the register ought never to have been there; if that is made out, then the series of cases to which I have alluded shews that a lapse of five years does not preclude the rectification of the register, and that a man does not by being on the register for five years get a right to be there when, in point of fact, he ought never to have got there at all. I say that without further discussing sects. 3 and 5, which, if they had to be spelt over now for the first time, would give rise to difficulty. The difficulty has been solved in that manner. I have been myself a party to two of those decisions, though not to the third, but I find that Lord *Selborne*, who presided in the Court when *In re Leonard & Ellis's Trade-mark* was before it, adopted and extended the view previously taken in the case of *In re Palmer's Trade-mark*. Now, having cleared the ground as to the legal construction of those two sections, we are brought to the facts of this particular case. The application to rectify the register is made under sect. 5 of the Act of 1875. [His Lordship read that section.] The right and title of Messrs. *Wood* to enter the word "*Eton*" upon the register or to be registered in respect of that word turns upon sect. 10 of the same Act, which contains the words relied upon on their behalf: "Any special and distinctive word or words or combination of figures or letters used as a trade-mark before the passing of this Act may be registered as such under this Act." The question of fact which we have to consider is narrowed down

(1) 21 Ch. D. 47. (2) 26 Ch. D. 288.
(3) 30 Ch. D. 454.

to this: whether the word "*Eton*" was when registered—and that appears to me to be the true construction of the Act—a special and distinctive word, denoting that "*Etons*" were cigarettes manufactured by Messrs. *Wood*. I observe in passing that the expression "used as a trade-mark before the passing of this Act" would not authorize, in my view at all events, the registration of that which was not a distinctive mark at the time of registration. You must have the two things, the distinctive mark as a trade-mark at the time of registration, and it must have been used previously to the passing of the Act. The question, therefore, is reduced to one of fact—was or was not this word "*Eton*" a distinctive mark, Messrs. *Wood's* distinctive trade-mark, at the time they registered that word?

Now, upon that I should myself come to the conclusion that the balance of the evidence was in their favour, and but for the difficulty to which I shall presently allude, I should come to the same conclusion as Mr. Justice *Pearson* did—that at the time of the registration the word "*Eton*" was their distinctive trade-mark. I then come to the real difficulty, which Mr. Justice *Pearson* saw, and which he did not think insuperable, but which I think quite insuperable. What is meant by a distinctive trade-mark? It must mean some mark which distinguishes the goods to which it is attached as those made or sold by the person who uses the mark. The evidence is perfectly plain, clear, and uncontradicted, that before and at the time when this mark was registered Messrs. *Wood* had not only permitted but done these two things. They had first of all themselves sold these "*Etons*," made by them, with this label: "*St. Petersburg, P. Mavrogordato & Co.*—Cigarettes." There is nothing about "*Wood*" on that. There is nothing whatever to shew further than what I have read what these things are; by whom they are made or by whom they are sold—nothing to shew that it was their distinctive mark. I quite agree that there is a great deal of evidence, so great as to satisfy me, as it satisfied Mr. Justice *Pearson*, that persons in the cigarette trade knew perfectly well what all this meant, and that "*Mavrogordato*" was nothing at all, and that these things were made by *Wood*. But, as it appears to me, that is not sufficient. It is not sufficient to shew that those who are in the trade knew the facts,

C. A. 1886 *In re* WOOD'S TRADE-MARK. WOOD *v.* LAMBERT & BUTLER. Lindley, L.J.

but the question is what the public knew. How is it conceivable that any mere cigarette smokers would understand by these labels, or by the word "*Eton*," or anything else—how would they assume or come to the conclusion that "*Eton*" meant cigarettes made by Messrs. *Wood?* Messrs. *Wood* have so used their own mark in this particular case as to lead people who do not know the truth to the conclusion that "*Etons*" are not Messrs. *Wood's*; that is to say, they have destroyed by their own act that which, but for this act, would have been the distinctive mark adopted by them. And the case does not rest there. They have made for Messrs. *Lambert & Butler* cigarettes, and supplied those cigarettes to them with a trade-mark designed by them for Messrs. *Lambert & Butler*, "*Constantinople, Jancal Tachta Cigarettes.*" There is nothing about *Lambert & Butler* on this; there is nothing about "*Wood*" on this, but these are things made by Messrs. *Wood* and supplied by them to Messrs. *Lambert & Butler*. What for? For the purpose of enabling *Lambert & Butler* to sell these goods, Messrs. *Wood's* goods, as something which is distinctly not Messrs. *Wood's*. Persons in the trade, persons knowing the secrets of the trade, may not be deceived, but any buyer would be deceived by this. It would be perfectly impossible for any purchasers of cigarettes not in the secrets of the trade to understand these words to mean Messrs. *Wood's* cigarettes. Messrs. *Wood* have so acted in connection with the word "*Eton*," and so allowed other people to use the word, as to destroy the value of the word "*Eton*" as a distinctive mark to the public of goods made by Messrs. *Wood*. It appears to me, therefore, upon this evidence that Messrs. *Wood* were not entitled when they registered this word "*Eton*" to say that the word was their distinctive trade-mark. They had used that word so as to shew the contrary—not to the trade at all, I quite agree with Mr. Justice *Pearson* there, but to those who were not in the secrets of the trade. The trade itself knew that what was done was a juggle, but the public knew nothing about it. That, it appears to me, is the short ground upon which the claim of Messrs. *Wood* must fail. [His Lordship, after referring to the argument that the word "*Eton*" denoted size, and, in his judgment, it could not mean anything except size, said that he based his judgment upon what Messrs. *Wood*

had proved to demonstration it did not mean to the public.] On that ground, therefore, the register ought to be rectified. It follows, of course, that the Plaintiffs cannot maintain this injunction against Messrs. *Lambert & Butler*, and their action for the injunction will be dismissed with costs, and the register must be rectified. As to the costs, I have been satisfied that Messrs. *Lambert & Butler* were not aware in 1876 of this registration. Under these circumstances this appeal must succeed and Messrs. *Wood* must pay the costs of the application to rectify, and the costs both here and below.

FRY, L.J.:—

I am of the same opinion. The first question is, whether or not the application to rectify the register is open to the Defendants after the lapse of five years from the date of the registration? That question appears to me to have been entirely determined by the three cases to which Lord Justice *Lindley* has referred. I will only add that the late Lord Chancellor in the *Valvoline Case* (*In re Leonard & Ellis's Trade-mark* (1)) summarised the effect of the previous decision in a way which appears to me to be exactly in accordance with that decision, and with the subsequent decision of the Court. Referring to *In re Palmer's Trade-mark* (2) he says (3): "It was determined in that case, upon the construction of the 3rd and 5th sections of the Act, that the 3rd section, making the registry of a trade-mark *primâ facie* evidence, and the continuance of the registration for five years conclusive evidence of the right of the registered proprietor to the exclusive use of that trade-mark, subject to the provisions of the Act, does not control, and has no bearing upon the right of any one who holds himself aggrieved by any improper registration to apply under the 5th section for the removal from the register of the alleged trade-mark which he says has been improperly registered." Now that having been the decision of this Court it is impossible for us here to entertain the argument which has been addressed to us.

Then the question arises, whether the Plaintiffs were im-

(1) 26 Ch. D. 288. (2) 21 Ch. D. 47.
(3) 26 Ch. D. 293.

C. A. 1886

*In re* WOOD'S TRADE-MARK.

WOOD *v.* LAMBERT & BUTLER.

FRY, L.J.

properly registered as the owners of this trade-mark. They claim that the use of the word "*Eton*" is a trade-mark within the meaning of sect. 10 of the *Trade Marks Act*, 1875, under which all these proceedings have taken place; and they rely on the definition of a trade-mark in that section: "Any special and distinctive word or words or combination of figures or letters used as a trade-mark before the passing of this Act." Now, it appears to me that to satisfy the requirements of that definition the word or words must be distinctive in this sense, that they distinguish the manufacture of the person who has registered the trade-mark from the manufacture of all other persons. I say "manufacture," but of course there may be cases in which they distinguish, not the manufacture, but the selection, or some other operation, upon the goods. But in all cases the word or words must distinguish the product of the person claiming the trade-mark from the product of all other persons; and it appears to me that it must have that distinctive character at the time of the registration. Then there is a further requisite, that such distinctive word or words must have been used as a trade-mark before the passing of the Act. In my judgment, in the present case, the Plaintiffs have undertaken a somewhat difficult task in asking us to hold, as they do, that the one word "*Eton*" has carried with it these three meanings: that it has described in the first place, the size of the cigarette; in the second place, the quality of the tobacco of which it is made; and in the third place, the maker of that cigarette. I say it is difficult, because it appears that Mr. *Wood* was the original inventor of this size of cigarette. He introduced it in the year 1870, I think, and of course it is open to all the public to make a cigarette of the same size and of the same quality. Now, if the word "*Eton*" signifies size and quality, it is not at first sight easy to see that the public who might make a cigarette of that character, might not call it by the name which indicated that size and that quality. At the same time I am far from laying down that the evidence might not support the conclusion that it indicated also the name of the maker. I do not think it necessary to express any conclusive opinion upon what the result of the evidence would be in this case if it were not for the two circumstances to which I am about to refer. I feel more doubt on the evidence than was expressed by Lord

Justice *Lindley*. I am more inclined to attribute weight to the evidence which tends, to my mind, to shew that there was a considerable manufacture of cigarettes under this name by persons, no doubt carrying on a much smaller trade than the Plaintiffs; but I shall assume, for the purpose of my present judgment, that the learned Judge was right in the conclusion which he came to, independently of the two circumstances to which I will now refer. Those two circumstances are, of course, the same as Lord Justice *Lindley* has dealt with: the first, the use by the Plaintiffs themselves of the "*Mavrogordato*" label, which I cannot for a moment doubt represents the cigarettes contained in the box on which that label is placed, as having been the product of a firm carrying on business in *St. Petersburg*. How is it possible for the Plaintiffs to say that the label with the word "*Eton*" upon it is distinctive of their manufacture when they themselves have represented that the "*Eton*" cigarettes are made by people in *St. Petersburg?* Precisely similar observations apply to the other case, namely, the "*Jancal Tachta*" label. There the Plaintiffs themselves designed for the Defendants a label which represents the cigarettes contained in the box as being the product of a *Constantinople* firm; and I repeat the question, how is it possible for the Plaintiffs to say that the word "*Eton*" is distinctive of their manufacture when they for a second time have represented it as being the manufacture of another person? In my judgment where a person uses a name and represents that name to be applicable to the product of a manufacturer or manufacturers other than himself, so as to produce the belief that the goods are the manufacture of that third person or persons, he cannot say that the word is distinctive of his own manufacture. Nor do I think that that principle applies the less because the Plaintiffs may be false in the assertion that there is any such firm or firms as the manufacturer represents. He who has made the goods has taken upon himself to represent two things: in the first place, that they are not his manufacture but somebody else's; in the second place, that a firm exists which does not exist at all. It appears to me that the Plaintiffs have by that conduct entirely precluded themselves from contending in this case that the word is a distinctive word or words.

C. A. 1886 — *In re* WOOD'S TRADE-MARK. WOOD *v.* LAMBERT & BUTLER. — Fry, L.J.

Now those two cases of user took place certainly before the registration, and in all probability both of them occurred, certainly one of them did, before the passing of the Act.

For these reasons I think the action must be dismissed with costs, and that the Plaintiffs must pay the costs of the application to rectify the register.

But I cannot part with this case without making one further observation: that it has disclosed on both sides a tale of fraud to which it is difficult to listen without indignation. It appears not to be doubted that cigarettes of a Turkish or Russian manufacture were preferred in *England* to those of a home product: and what then did the Plaintiffs and Defendants do? The Plaintiffs and Defendants, both of whom are represented to be persons of considerable business, and both of whom, I suppose, regard themselves as respectable persons—the Plaintiffs represent their own manufacture as being made at *St. Petersburg*, and their own cigarettes made in *London* as being Russian cigarettes. The Defendants represent those cigarettes which they buy in *London* from the Plaintiffs as being Turkish cigarettes; and the Plaintiffs conspire with the Defendants to commit that fraud, and design for them the label which is to give effect to it. It appears to me that if practices of this description are as common as they are alleged to be, the name of an English manufacturer or merchant will cease to be an honourable one, and will carry with it, not notions of honesty and fair dealing, but of covin, fraud, and deceit.

LOPES, L.J.:—

I have nothing, I may say, to add to the judgments which have been already delivered. But this is an important case. It has taken much time, and I should like very shortly to express my view with regard to it.

The question, as it appears to me, is this: had *Wood*, when he registered, in June, 1876, any trade-mark which he could register; or, putting it in other words, was the word "*Eton*" at that time a special and distinctive word which would convey to the trade and to the public an intimation that the goods marked "*Eton*" were the exclusive manufacture of *Wood?*

Now there has been a very large amount of evidence adduced in this case, both before the learned Judge who tried it, and also before this Court. I think it unnecessary to go into that evidence. I am content to deal with so much of it as appears to me to be uncontroverted and undisputed. I refer to the conduct of Messrs. *Wood* before June, 1876, when the word "*Eton*" was registered by them. It is beyond all question on the evidence, that before that time they had permitted cigarettes in boxes marked with the word "*Eton*" to be sold to the public as the manufacture of *Jancal Tachta*, and to be represented, upon the boxes, to be made in *Constantinople*, when in point of fact they were made in *London*. Large quantities are sold in boxes of this kind, marked: "Cigarettes of the finest selected Turkish tobacco manufactured by *Jancal Tachta, Constantinople*." Now, what would that convey to a purchaser of a box of cigarettes with a label of that kind upon it? Surely it would convey to his mind this, that he was buying cigarettes made in *Constantinople* by a Turkish manufacturer, and the last thing that would occur to his mind would be that he was buying cigarettes made in *London*, and by one *John Wood*. Then, again, it is uncontradicted that the *Woods* themselves sold large quantities of cigarettes with the name "*Mavrogordato & Co.*" upon them, "*Eton*" at the top, and "*St. Petersburg; Mavrogordato & Co.* Cigarettes." There again, any purchaser buying these cigarettes, beyond all question, would have come to the conclusion that they were made at *St. Petersburg*, and would never for a moment think he was buying the goods of Messrs. *Wood & Co.* After evidence of this kind it is impossible for the Plaintiffs to contend that the word "*Eton*" was a special distinctive mark; and it appears to me that Mr. Justice *Pearson* in the judgment that he delivers, when dealing with the evidence to which I have called attention, seemed to hold a very strong view with regard to it, because he says: "At one time I thought that that"—that is the evidence to which I have alluded—"ought to be almost fatal to the case; but it appears from the evidence, that that is the common practice in the tobacco trade." The common practice to do what? To deceive the public, and to palm off upon them cigarettes not made as represented, but made in different places

C. A. 1886 *In re* WOOD'S TRADE-MARK. WOOD *v.* LAMBERT & BUTLER. Lopes, L.J.

and by different people. I am at a loss to see how any common practice of that kind can assist the Plaintiffs in this case; nor, indeed, can I understand why it is the trade only that are to be considered. Surely it ought to be a special distinctive mark, not only recognisable by the trade, but also recognisable by the consumer, and connecting the article with the manufacturer.

There is only, I think, one observation which I desire further to make, and that is this. It is with regard to the construction of the *Trade Marks Act*, 1875, sects. 3 and 5. I desire to say that I agree with the construction which has been placed on those sections by this Court. I do not think that a man by being five years on the register acquires an indefeasible right to be there, if he had originally no right to be placed on the register. I agree with the decision which has been already given in this case with regard to the costs.

Solicitors: *Parson, Lee, & Holmes; Morten, Cutler, & Co.*

F. G. A. W.

---

C. A. 1885 NORTH, J. *June* 22, 23, 24. C. A. 1886 *Feb.* 4, 5, 6, 11.

## MILES *v.* NEW ZEALAND ALFORD ESTATE COMPANY.

[1884 M. 1566.]

*Company—Articles of Association—Paramount Lien on Shares of Member—Mortgage of Shares by Member—Priority—Contract—Compromise—Consideration—Forbearance of threatened Proceedings—Agreement not capable of being performed by both Parties within a Year—Performance by one Party—Statute of Frauds.*

The articles of association of a limited company provided that the company should have "a first and paramount lien" upon the shares of every member for his debts, liabilities, and engagements to the company. A shareholder made an equitable mortgage of his shares in favour of the Plaintiff as security for an advance, and the Plaintiff gave the company notice of his charge. After the date of the notice the shareholder gave a written guarantee to the company:—

*Held*, in accordance with *Bradford Banking Company* v. *Briggs & Co.* (1),

(1) 31 Ch. D. 19.

that, supposing the guarantee to have been given for valuable consideration, the company were by virtue of their articles entitled to priority for their claims over the charge in favour of the Plaintiff.

The guarantor was not only a shareholder, but he was also a director of and the vendor to the company. The guarantee was given at a general meeting of the shareholders after an angry discussion had taken place, but it did not appear that any resolution was passed at such meeting with reference to it. It was that a minimum dividend should be paid to the shareholders yearly during ninety years; and that the guarantor should pay sums sufficient to make up that minimum in every year in which the company had not earned it. There was no consideration for the giving of the guarantee upon the face of the instrument, but it was found by *North*, J., that it was in fact given in consideration of an agreement come to at the general meeting of the shareholders to abandon proceedings in contemplation against the guarantor, and it was held by his Lordship that such an agreement to abandon threatened proceedings when followed, as in this case, by actual abstention from proceedings, constituted an agreement performed by one party within one year from the making thereof, and that the case was not within the 4th section of the *Statute of Frauds*, and further, that the 4th section could not be invoked against a defendant in an action of this character:—

*Held*, upon appeal, by *Cotton* and *Fry*, L.JJ. (*Bowen*, L.J., *dissentiente*), that there was no sufficient evidence of any intended claim by the company or the shareholders against the guarantor, or any contract binding the company to abandon such claim, and accordingly that there was no consideration to support the guarantee.

*Held*, by *Bowen*, L.J., concurring with *North*, J., that upon the evidence proceedings had in fact been threatened, and were dropped in consequence of the guarantee; and that this was sufficient consideration to support it.

A *bonâ fide* compromise of a real claim is good consideration, whether the claim would have been successful or not.

*Cook* v. *Wright* (1); *Callisher* v. *Bischoffsheim* (2); and *Ockford* v. *Barelli* (3), approved, and the observations in *Ex parte Banner* (4) by Lord *Esher*, M.R., on the authority of these cases, dissented from by the Court.

THE *New Zealand Alford Estate Company, Limited*, was incorporated under the *Companies Acts* of 1862 and 1867, with articles of association, the material clauses of which were as follows:—

"8. The company shall not be bound to recognise any contingent, future, partial, or equitable interest, in the nature of a trust or otherwise, in any share, or any other right in respect of any share, except an absolute right thereto in the person from time to time registered as the holder thereof. . . ."

(1) 1 B. & S. 559.
(2) Law Rep. 5 Q. B. 449.
(3) 20 W. R. 116.
(4) 17 Ch. D. 480, 490.

C. A. 1886 MILES v. NEW ZEALAND ALFORD ESTATE CO.

"23. No shares shall be transferred to a stranger so long as the company or any member is willing to purchase the same at a fair value."

"28. The company may decline to register any transfer of shares upon which the company has a lien by virtue of clause 43 hereof."

"43. The company shall have a first and paramount lien upon all the shares of each member, for his debts, liabilities, and engagements, solely or jointly with any other person, to or with the company, whether the period for the payment, fulfilment, or discharge thereof shall have actually arrived or not."

"44. For the purpose of enforcing such lien the directors may sell the shares subject thereto without any notice to or consent by the holder of such shares, or any other person; but no sale shall be made unless and until default be made in the payment, fulfilment, or discharge of such debts, liabilities, or engagements."

The Defendant, *Samuel Grant*, who was one of the promoters of the company, was in May, 1882, and at the hearing of this action was still, the registered holder of 125 shares of £100 each in the company. In May, 1882, when £40 a-piece had been paid up on these shares, *Grant* accepted and discounted two accommodation bills payable at six and eighteen months after date for £5000 each, drawn on him by the Plaintiff, *E. P. W. Miles*, applied the proceeds to his own use, and deposited the certificates of his shares with the Plaintiff.

By indenture dated the 19th of October, 1882, the Defendant *Grant* charged his 125 shares with the two sums of £5000 and interest thereon at £5 per cent. per annum, and covenanted at any time during the continuance of the security to execute a legal transfer of the shares in favour of the Plaintiff; and by an agreement under seal of the same date *Grant* covenanted with the Plaintiff to pay all calls upon the shares during the continuance of the security, and it was agreed that in default the Plaintiff might pay such calls and add the moneys so paid with interest thereon to his security.

On the 4th of November, 1882, notice in writing of the Plaintiff's interest in *Grant's* 125 shares under the indenture of the 19th of October, 1882, was served upon the company, and this

notice was acknowledged by the company on the 6th of November, and was entered in the share register.

When the bills came to maturity *Grant* made default in payment, and the Plaintiff paid them.

A call of £20 per share was made by the company on the 12th of December, 1882. *Grant* made default in payment, and this and the subsequent calls made by the company were paid by the Plaintiff in order to avoid a forfeiture of the shares.

*Grant*, besides being a promoter of the company and the holder of the above-mentioned shares, was the vendor to the company of the property in *New Zealand* known as the *Alford Estate*, the acquisition and working of which was the substantial object of the formation of the company. He was also the chairman of the board of directors, and at a general meeting of the company held on the 15th of March, 1883, an angry discussion took place, at the close of which he gave to the company a written guarantee or warranty signed by himself in the following terms:—

"Gentlemen,—I hereby guarantee that a dividend (duly earned during the year) of not less than £3 per centum per annum be paid to the shareholders for the year ending the 30th of June, 1883, and afterwards that there shall be paid to them a yearly dividend of not less than £5 per centum per annum (duly earned during the year) for a period of ninety years, and I undertake within three calendar months after the end of any and every year to pay to you any sum requisite to pay the agreed minimum dividend if the company has not earned it."

No resolution was passed at the general meeting with reference to the giving of the guarantee.

*Grant* was adjudicated a bankrupt on the 19th of February, 1884. In May, 1884, there being due to the Plaintiff upon the security of the indenture and memorandum of agreement of the 19th of October, 1882, the sum of £7885, he applied to the company to do and concur in all acts necessary for effecting a sale and transfer of the 125 shares.

The company, however, claimed a lien on the shares under the guarantee given to them by *Grant* and their articles of association, in priority to the Plaintiff's charge; and they refused to permit any sale or transfer of the shares until their claim was

C. A. 1886 MILES v. NEW ZEALAND ALFORD ESTATE CO.

satisfied. The Plaintiff then brought this action against the company and *Grant* and his trustee in bankruptcy, and claimed a declaration that under the deed of the 19th of October, 1882, he was entitled to a first charge on the 125 shares for the principal and interest secured thereby, and for all sums paid by him for calls, and to have this charge enforced by foreclosure or otherwise, and he pleaded that the guarantee given by *Grant* was not under seal, that no consideration had been given for it, and that even if consideration had been given, the document did not comply with the requirements of the *Statute of Frauds*. To this the company rejoined that the guarantee "was executed as part of a contract whereby the company and the shareholders for whose benefit it was executed, in consideration of the execution by the Defendant *S. Grant* of the said documents, agreed to put an end to certain contemplated proceedings against the Defendant *S. Grant* and to give up certain claims against him, and that they did in pursuance of such contract abandon such proceedings and give up such claims and accept the guarantee in full accord and satisfaction of the right of action founded on such claims;" and they pleaded also that the said contract was one to be performed, and that it was in fact performed, within one year from the making thereof.

The evidence upon the question whether any consideration was in fact given for the guarantee was chiefly derived from an affidavit of Mr. *J. Redmayne*, the secretary of the company, the material paragraphs of which were as follows:—

"1. . . . . The Defendant *Grant* made many representations to the persons who originally formed the company, and to persons who became shareholders thereof, to the effect that the *Alford* estate was of great value, and to the effect that the labour expenses in working the said estate did not exceed a stated sum, and other representations calculated to induce such persons to find moneys to form and become shareholders in the company.

"3. It was subsequently and some time before the meeting hereinafter mentioned discovered that the statements made by the Defendant *Samuel Grant* as to the value of the estate were untrue and that the labour expenses greatly exceeded the amount stated by him as aforesaid.

"4. Claims were accordingly made on the Defendant *Samuel Grant* by the Defendant company and on behalf of the shareholders thereof, and it was intimated that proceedings would be taken to set aside the sale and recover the purchase-money from him.

"5. At the general meeting of the Defendant company on the 15th day of March, 1883, . . . . the threatened proceedings against the Defendant *Samuel Grant* was the main subject discussed by the shareholders. The Defendant *Samuel Grant* was told that it was the intention of the Defendant company to take immediate proceedings against him, and he thereupon made two or three offers with a view to the settlement of the matter and to compromise the claim and escape legal proceedings, and eventually he offered to sign the guarantee in the said affidavits mentioned in consideration of the Defendant company and the said shareholders agreeing to abandon the contemplated proceedings against him and agreeing to give up their claims against him which were the subject of the intended proceedings.

"6. The Defendant company and the shareholders were advised that their claims were substantially of such a nature that if not enforced at once they could not be enforced at all, and such claims were, in fact, claims for rescission of contract which could not be equitably enforced if proceedings were not immediately taken and the Defendant company, in pursuance of the said agreement under which the said guarantee was assigned, and in consideration of the said guarantee, abandoned the intention of taking such proceedings and gave up such claims and did not commence any proceedings or assert any claim."

The other evidence as to the circumstances under which the guarantee was signed will sufficiently appear from the judgments of their Lordships, who, it will be seen, differed somewhat as to the conclusion to be drawn therefrom.

The action came on for trial before Mr. Justice *North*, upon motion for judgment in default of pleading against the Defendant *Grant* and his trustee in bankruptcy, and was heard on the 22nd, 23rd, and 24th of June, 1885.

*Davey*, Q.C., and *Stirling*, for the Plaintiff:—

Our charge was created before *Grant's* undertaking to the

C. A. 1886 MILES v. NEW ZEALAND ALFORD ESTATE CO.

company, and the company had notice of our charge and acknowledged it. They cannot now claim priority to us: *Bradford Banking Company* v. *Briggs & Co.* (1). No doubt the decision of the Court of Appeal in *New London and Brazilian Bank* v. *Brocklebank* (2) is at variance with the decision of Mr. Justice *Field* in *Bradford Banking Company* v. *Briggs & Co.*, but in the latter case Mr. Justice *Field* followed the decision of the House of Lords in *Hopkinson* v. *Rolt* (3), which was not cited in *New London and Brazilian Bank* v. *Brocklebank*. Further, there was no consideration for the alleged guarantee. It was a *nudum pactum: Edwards* v. *Baugh* (4); *Cook* v. *Wright* (5); *Callisher* v. *Bischoffsheim* (6); *Ex parte Banner* (7). If there was a consideration, it is not evidenced in writing, and it was a contract not to be performed within a year, and therefore the company are precluded by sect. 4 of the *Statute of Frauds* from setting up the guarantee.

*Barber*, Q.C., and *Blake Odgers*, for the company:—

The first point is concluded by the decision of the Court of Appeal in *New London and Brazilian Bank* v. *Brocklebank*. The case of *Hopkinson* v. *Rolt* has really nothing to do with the point in question here. It was a decision on the law of mortgage, and does not affect company law. Under the articles these shares were issued with an inherent and inseverable incident attaching to them, and the company were not in any way affected by notice of the Plaintiff's claim: *Société Générale de Paris* v. *Tramways Union Company* (8); *Horsfall* v. *Halifax and Huddersfield Union Banking Company* (9). As to the guarantee, the forbearance to sue was ample consideration for it: *Alliance Bank* v. *Broom* (10); *Crowther* v. *Farrer* (11); and it was a contract that could be performed, and was in fact performed, within a year. The Plaintiff, therefore, cannot set up the *Statute of Frauds: Donellan* v. *Read* (12); *Cherry* v. *Heming* (13).

(1) 29 Ch. D. 149.
(2) 21 Ch. D. 302.
(3) 9 H. L. C. 514.
(4) 11 M. & W. 641.
(5) 1 B. & S. 559.
(6) Law Rep. 5 Q. B. 449.
(7) 17 Ch. D. 480.
(8) 14 Q. B. D. 424.
(9) 52 L. J. (Ch.) 599.
(10) 2 Dr. & Sm. 289.
(11) 15 Q. B. 677.
(12) 3 B. & Ad. 899.
(13) 4 Ex. 631.

*C. Lucas*, the trustee in bankruptcy of *Grant*, did not appear.

*Davey*, in reply, on the second point:—

The guarantee from its form was an agreement not to be performed within a year. It was an agreement to forbear from suing for all time, and for six years at any rate. Therefore it is not within the statute.

NORTH, J. (after stating the facts, and deciding the first point by following the decision of *Field*, J., in *Bradford Banking Company* v. *Briggs & Co.* (1), which had not at that time been reversed by the Court of Appeal, proceeded as follows):—

But then there is a second part of the case, which has occupied the chief time here. It is one in which questions of fact are involved as well as questions of law. It is said there is no consideration for the guarantee, and that the guarantee is not binding, and that, therefore, even if the guarantee would have priority over the Plaintiff, it does not create any charge on behalf of the company. Now, in respect to that, this guarantee, for so I will call it for convenience, is said to have been founded upon a compromise. The reason why I express an opinion upon this part of the case, after having decided the other point in favour of the Plaintiff, is this, that it involves some questions of fact. The case is eminently an important one, it may very well go further, and it is only right that the Court of Appeal should have my conclusion upon the questions of fact as to which I have heard evidence *vivâ voce*.

Now upon this part of the case *Cook* v. *Wright* (2) and *Callisher* v. *Bischoffsheim* (3) have been referred to. Those cases have been fully commented upon, and I do not intend to read them again further than to read this passage from the judgment of Mr. Justice *Blackburn* in *Cook* v. *Wright*. He says (4) (referring to the defendant): "It appeared on the evidence that he believed himself not to be liable; but he knew that the plaintiffs thought him liable, and would sue him if he did not pay, and in order to avoid the expense and trouble of legal proceedings against himself he agreed to a compromise; and the question is, whether a person

(1) 29 Ch. D. 149.
(2) 1 B. & S. 559.
(3) Law Rep. 5 Q. B. 449.
(4) 1 B. & S. 568.

C. A. 1886 MILES v. NEW ZEALAND ALFORD ESTATE CO. North, J.

who has given a note as a compromise of a claim honestly made on him, and which but for that compromise would have been at once brought to a legal decision, can resist the payment of the note on the ground that the original claim thus compromised might have been successfully resisted." The law is again stated in *Callisher* v. *Bischoffsheim* (1), and I do not pause to read that again as it has been already referred to more than once. But there is a later decision of the Court of Appeal in *Ex parte Banner* (2). It was decided there that the compromise was obtained by what the law considered a fraud, and therefore it could not stand; but in the course of his judgment Lord Justice *Brett* says (3): "But then two cases were cited. Reliance is placed on *Callisher* v. *Bischoffsheim*, in which Lord Chief Justice *Cockburn* said, 'the authorities clearly establish that if an agreement is made to compromise a disputed claim, forbearance to sue in respect of that claim is a good consideration.' But in a subsequent part of his judgment he said: 'When such a person forbears to sue he gives up what he believes to be a right of action.' Therefore, it is not enough that the action is brought to settle a disputed claim; it must be a claim by a person who believes he has a right of action. But in the present case, I say that, although Mr. *Shiel* believed he would win the cause, he never did believe that he had a right of action; he knew that he had none. Therefore, even if that, which was not a case in bankruptcy, could apply to a case in bankruptcy, it does not govern the present case. But whenever a similar case arises, I think it will have to be carefully considered whether the decision in *Callisher* v. *Bischoffsheim* can be supported, and whether, in order to support a compromise of an action, it is not necessary to shew, not only that the plaintiff believed that he had a good cause of action, but that the circumstances did in fact raise some doubt whether there was or was not a good cause of action, and I venture to doubt whether, if there was clearly and obviously no cause of action, the mere belief of the parties that there was would support the compromise. It is true that the subsequent case of *Ockford* v. *Barelli* (4) (if that be also held to be good law)

(1) Law Rep. 5 Q. B. 449.
(2) 17 Ch. D. 480.
(3) 17 Ch. D. 489.
(4) 20 W. R. 116.

is an authority against this view, because in it there could not possibly be a doubt that there was no cause of action. But I take it that *Ockford* v. *Barelli* (1) was decided upon the authority of *Callisher* v. *Bischoffsheim* (2), adopting the view that the passage which I have read from the earlier part of the judgment of Lord Chief Justice *Cockburn* was the ground of the decision. Of course, if it were so taken, the Court in the later case, being a Court of co-ordinate jurisdiction, was bound by the decision in the earlier case; but then, if the first case falls, the second would fall with it." The present Master of the Rolls pointed out there that *Callisher* v. *Bischoffsheim* bound another Court of the Common Law Division when the same point came before it. So in the same way the decision of those two Courts certainly binds me; and the observations thrown out by the Master of the Rolls merely point to this, that there is something to be carefully considered when the matter comes again before a Court which could overrule those cases; but it does not indicate a course which could be properly taken by me. Under those circumstances, whatever my view, I should consider myself bound by those decisions, and if this matter is to be reconsidered it must be reconsidered by the Court of Appeal.

Then, that being the law I have to apply, the question here is what the facts of the case are. It is suggested that there were two matters of misrepresentation; first, as to the price or value; and, secondly, as to the accounts for labour in respect of the property sold by *Grant* to the company. Now, with respect to each of those, there is no evidence before me upon which I can come to the conclusion that there was any misrepresentation.

[His Lordship then discussed at length the circumstances under which the letter or guarantee of the 15th of March, 1883, was signed by *Grant*, and held that, although no consideration appeared on the face of it, it was in fact signed by him in consideration of the threatened proceedings against him not being taken, and that such consideration was sufficient to support the compromise, and continued:—]

Then there is another point, namely, assuming that there was a consideration for this document, it is said that that considera-

(1) 20 W. R. 116. (2) Law Rep. 5 Q. B. 449.

C. A. 1886 — MILES v. NEW ZEALAND ALFORD ESTATE CO. — North, J.

tion is ineffective in point of law, because the *Statute of Frauds* requires that the document should be in writing including the consideration, and the consideration is not expressed on the face of this document. No doubt under the *Statute of Frauds* an agreement, or a memorandum of agreement, which is not to be performed within the space of one year is required under certain circumstances to be in writing; and it is said this was a memorandum of agreement which was not to be performed within a year, because the consideration was that they were to abstain for the future from prosecuting any action upon the agreement, and that must apply at any rate as regards the shareholders to the whole period within which they could bring an action of deceit. The answer to that is, it is quite sufficient if the agreement was or might be performed by one side within a year; and the cases of *Donellan* v. *Read* (1) and *Cherry* v. *Heming* (2) were cited. I think there is a great deal of force in the observation, that what is required by the statute is, that the agreement should be performed, and not that it should be partly performed, and that performance means performance by both parties. But that has been settled: and it has been decided that all that is required is performance by one party within the year, however many years may have to elapse before the agreement is performed by the other party. Considering the object of the statute was to require that certain evidence should be preserved of the terms of a contract which would require a long time to accomplish, one does not see how that object is satisfied if what is contended is correct. It is said it has been fully performed because nothing has been done, that the proceedings threatened have not been taken, and that there has been an abstention from proceedings. On the other hand it is said the bargain is that there shall be a release, which might be within a year, or there shall be a forbearance to sue which must be effective and operative as long as the right to sue would but for that agreement have continued, that is to say, as regards the shareholders, forbearance must last for six years at least. It seems to me there are authorities which settle that what has been done in this case was a sufficient performance of the agreement on the part of the company within a year. Those authorities are, first

(1) 3 B. & Ad. 899.

(2) 4 Ex. 631.

of all, certain observations in the case of *Cook* v. *Wright* (1) which was cited by Mr. *Davey*. Towards the end of the judgment I find this. Mr. Justice *Blackburn* says (2): "We agree that unless there was a reasonable claim on the one side, which it was *bonâ fide* intended to pursue, there would be no ground for a compromise; but we cannot agree that (except as a test of the reality of the claim in fact) the issuing of a writ is essential to the validity of the compromise. The position of the parties must necessarily be altered in every case of compromise, so that, if the question is afterwards opened up, they cannot be replaced as they were before the compromise. The plaintiff may be in a less favourable position for renewing his litigation, he must be at an additional trouble and expense in again getting up his case, and he may no longer be able to produce the evidence which would have proved it originally. Besides, though he may not in point of law be bound to refrain from enforcing his rights against third persons during the continuance of the compromise, to which they are not parties, yet practically the effect of the compromise must be to prevent his doing so." And then he gives an instance which is derived from the case before him, which I pass over, and he says: "It is this detriment to the party consenting to a compromise arising from the necessary alteration in his position which, in our opinion, forms the real consideration for the promise, and not the technical and almost illusory consideration arising from the extra costs of litigation. The real consideration therefore depends, not on the actual commencement of a suit, but on the reality of the claim made and the *bona fides* of the compromise. In the present case we think that there was sufficient consideration for the notes in the compromise made as it was." Another case is that which was cited by Mr. *Odgers* of *Crowther* v. *Farrer* (3), where the judgment of Lord *Campbell* is this: "The motion in arrest of judgment is made on two grounds; first, that the declaration discloses no consideration for the defendant's promise; secondly, that there are not proper averments of performance of conditions precedent. Now, as to the first objection. The count states that it was agreed between the plaintiffs and

(1) 1 B. & S. 559. (2) 1 B. & S. 569.
(3) 15 Q. B. 677, 680.

C. A. 1886 MILES v. NEW ZEALAND ALFORD ESTATE CO. North, J.

defendant that the two actions should be settled, and all proceedings therein stayed. The question is not what would form a good plea in bar to the further maintenance of these actions, but whether this is a good consideration for the defendant's agreement. Is it not an advantage to the promisor and a disadvantage to the promisee, that two actions against the one at the suit of the other should be settled, and no proceedings taken therein? Then there is a general averment of performance, which after verdict is abundantly sufficient, though it might be bad on special demurrer: but the count goes further, and alleges performance more particularly. I think, however, that the agreement does not contemplate that any further act should be done to settle these actions. It appears that, by those who framed the agreement, they were considered as settled by the agreement itself; and I think rightly; for they were so settled. I cannot entertain any doubt that, if after such an agreement an attempt were made to proceed in the actions, the Court would interfere summarily if the defendant was not in default." Then Mr. Justice *Patteson* says: "Even if it was no more than an agreement on the part of the plaintiffs to refrain from going on, I think that was a sufficient consideration to support the promise of the defendant." And Mr. Justice *Coleridge* is of the same opinion, and Mr. Justice *Erle* adds: "I take it that, when the plaintiffs and the defendant agree that the actions are settled, the very agreement puts an end to the actions; that the Court would interfere if they were afterwards proceeded with; and that consequently no further performance of the agreement is required." Then as to the case of the *Alliance Bank* v. *Broom* (1), looking at the judgment of Vice-Chancellor *Kindersley*, he considered that forbearance was ample consideration independently of the question of an agreement to forbear. Those cases seem to me to shew that there has been in this case such an acceptance by the company and by the shareholders of what was given to them, that it was complete within a year, and that it cannot be said the agreement required more than a year to carry it out.

Then there is another reason why I do not think the *Statute of Frauds* is an answer. I do not think it is open to the Plaintiff to

(1) 2 Dr. & Sm. 289.

set it up. The Plaintiff seeks to realize his charge. The Defendants' answer is, "We have a charge which is prior to that." The action is brought by the Plaintiff to enforce his charge, and the *Statute of Frauds* says no action can be brought under this section unless this agreement, or a note or memorandum thereof, is in writing. The present action is not brought to enforce the charge the Defendants set up in any way; it is brought to enforce the Plaintiff's charge; and in respect to that it is a complete memorandum, because it is by deed. As regards the Defendants, I do not see anything to prevent their setting up their agreement, or to entitle the Plaintiff to resist it by setting up the *Statute of Frauds* in reply. It seems to me the case is not one to which this section applies. It is not an action brought whereby to charge the Plaintiff with the agreement in favour of the Defendants, and I cannot extend it and say the section can be read as if it were "any action in which the plaintiff seeks to charge the defendant, or the defendant seeks to set up against the plaintiff any counter-claim of his own." If this were a case in which the defendant had by a counter-claim set up a charge of his, and sought to enforce that, I should have considered that was equivalent to a separate action, and that the plaintiff might in answer to the counter-claim, beyond all question, set up the *Statute of Frauds*; but there is nothing like a counter-claim, and it seems to me I should be enlarging that section of the *Statute of Frauds* if I said the Plaintiff was entitled to set up the *Statute of Frauds* in answer to the case made by the Defendants. It seems to me the case of *Clarke* v. *Grant* (1) is an authority upon that, because the then Master of the Rolls pointed out that, although a plaintiff cannot attempt to enforce a written contract plus a parol term, yet there is nothing to prevent a defendant resisting a parol contract by setting up that it does not contain the whole of the terms; and he gives the reason, that the *Statute of Frauds* does not interfere with the position of the defendant. No doubt there are many cases, as Mr. *Davey* said, in which a Court has declined to enforce specific performance against a defendant, upon the ground that there was some collateral matter not expressed in writing which would make it unfair in the

(1) 14 Ves. 519.

C. A. 1886 MILES v. NEW ZEALAND ALFORD ESTATE CO. North, J.

discretion of the Court to enforce specific performance against a defendant when it could not enforce it as to the collateral matter; but that does not seem to me to affect the authority of that case nor the construction of the statute. Moreover, I find in the last edition of *Fry* on Specific Performance (1), *Clarke* v. *Grant* (2) is put as an authority for the proposition as to which I have made these remarks.

It seems to me, therefore, as regards that second part of the case, I cannot accede to the argument of the Plaintiff; but as regards the first point, I am of opinion that the claim of the Defendants has not priority over the claim of the Plaintiff, and that the Plaintiff is entitled to the relief for which he asks.

H. L. F.

C. A.

From this judgment the company appealed, and the following arguments were used and cases were cited in addition to those reported in the Court below.

The appeal came on for hearing on the 4th of February, 1886.

*Barber*, Q.C., and *Blake Odgers*, in support of the appeal:—

The decision of Mr. Justice *Field* in *Bradford Banking Company* v. *Briggs & Co.* (3), which was followed by Mr. Justice *North*, in deciding this question against the company, has been since reversed by the Court of Appeal (4). Upon the first point, therefore, that case is now an authority that the provision in their articles entitles the company to a charge upon the shares of any member for his engagements to them in priority to that of a mortgagee of such member.

Upon the second point, viz., whether there was any consideration moving towards *Grant* sufficient to support the guarantee given by him to the company, it is not necessary that there should have been an actual threat of legal proceedings by the company against *Grant*, if the company, or the shareholders present at the meeting of the 15th of March, 1883, thought that they had a claim against him. A farm in *Lincolnshire* belonging to *Grant* had been taken in exchange by *Tooth*, the original

(1) 2nd Ed. p. 248.
(2) 14 Ves. 519.
(3) 29 Ch. D. 149.
(4) 31 Ch. D. 19.

vendor of the property, and at the date of the meeting there was a suspicion in the minds of the shareholders and directors as to the *bona fides* of the sale by *Grant* to the company. It must be remembered that this was a small company, and most of the directors, and probably of the shareholders also, were present at this meeting. There is no obligation upon us to shew any fraud by *Grant*. It is enough that there were circumstances requiring explanation, and as there was a promise to forbear, followed by an actual forbearance by the company and all the shareholders, that is evidence of the agreement to forbear. This agreement was performed by the company and the shareholders when they gave up the contemplated proceedings and right of action, and took this guarantee from *Grant*; and performance by one party within the year is enough to take a contract out of the *Statute of Frauds*, however long the period for performance by the other party may be.

[They referred to *Crowther* v. *Farrer* (1) and *Clarke* v. *Grant* (2).]

*Davey*, Q.C., and *Stirling*, for the Plaintiff:—

In order to support such a consideration as forbearance to sue, the company must shew the existence of some claim against *Grant* entitling them to a remedy against him. At all events the person threatening to sue must believe he has a cause of action, and a prospect of success: *Ockford* v. *Barelli* (3). If, as here, there was clearly no cause of action, the belief of the shareholders at the meetings that there was one would not be enough: *Ex parte Banner* (4); *Loyd* v. *Lee* (5); *Edwards* v. *Baugh* (6). Again, if the consideration for which *Grant* gave this guarantee was forbearance to sue, it was not capable of being performed within the year, and the *Statute of Frauds* applies; for to abstain from suing for one year only would not be enough, the abstaining must last as long as the right of action continues to exist.

[As to the effect of the 4th section of the *Statute of Frauds* they referred to *Britain* v. *Rossiter* (7).]

[BOWEN, L.J., referred to *Maddison* v. *Alderson* (8); *Scotson* v.

(1) 15 Q. B. 677.
(2) 14 Ves. 519.
(3) 20 W. R. 116.
(4) 17 Ch. D. 480.
(5) 1 Str. 94.
(6) 11 M. & W. 641.
(7) 11 Q. B. D. 123.
(8) 8 App. Cas. 467.

C. A. 1886 MILES v. NEW ZEALAND ALFORD ESTATE CO.

*Pegg* (1); *Surtees* v. *Lister* (2); and *Fry*, L.J., referred to *James* v. *Williams* (3).]

*Blake Odgers*, in reply:—

It is inconceivable that a man of business would have given such a guarantee unless proceedings had been threatened against him. The evidence shews that there were at all events claims against *Grant* made by individual shareholders, and if one shareholder was induced by the guarantee to abandon his claim that would be a sufficient consideration to support it. Moreover, the conduct of both parties subsequent to the giving of the guarantee shews the existence of the agreement, and that they mutually held themselves bound by it.

1886. Feb. 11. COTTON, L.J.:—

This is an appeal of the Defendant company from a judgment of *North*, J., in an action brought by the Plaintiff in order to enforce his right under an equitable mortgage on shares in the company, and two questions are raised for the decision of the Court. First, whether the company, supposing them to have a legal claim against *Grant*, the holder of the shares, are entitled under their articles of association to priority for that claim as against the claim of the Plaintiff; and, secondly, whether they had in fact any legal claim against *Grant*. Mr. Justice *North* held that, in fact, they had a good claim, but he held, on the authority of *Bradford Banking Company* v. *Briggs & Co.* (4), as decided in the Court below, that the company were not entitled in priority to the Plaintiff.

Now the facts of the case are so like those of the *Bradford Banking Company* v. *Briggs & Co.* that, in my opinion, it would be wrong to attempt to distinguish the two cases; and as the *Bradford Banking Company* v. *Briggs & Co.* is a decision of this Court of course we cannot question it. It binds us, and, therefore, without expressing any opinion as to whether I should have given the same judgment as was given in that case on that point, in my opinion the Court is precluded from entering into the question

(1) 6 H. & N. 295.
(2) 30 L. J. (Ex.) 369.
(3) 3 Nev. & Man. 196.
(4) 29 Ch. D. 149.

as to the priority of the claims of the Plaintiff and the company if the company had any claim as against *Grant*.

But then comes the question, had the company in fact any legal claim as against *Grant?* Their claim was under a letter signed by *Grant*, which guarantees or undertakes that a certain yearly dividend shall be paid to the shareholders during a long period of years, and it is objected that no consideration appears upon the face of the letter, and that no consideration was in fact given to *Grant* for that promise (I call it "promise," because to call it "contract" would be to assume there was consideration) given by the shareholders.

Now there was much argument upon the question, what is a good consideration for a compromise; and there are authorities which for a considerable time were considered as laying down the law upon the subject; but Lord *Esher*, the present Master of the Rolls, in *Ex parte Banner* (1), is supposed to have thrown doubts on these authorities; and what he said was in fact that if the question ever came before this Court the authority of *Callisher* v. *Bischoffsheim* (2), *Ockford* v. *Barelli* (3), and *Cook* v. *Wright* (4) would have to be considered.

Now, what I understand to be the law is this, that if there is in fact a serious claim honestly made, the abandonment of the claim is a good "consideration" for a contract; and if that is the law, what we really have to now consider is whether in the present case there is any evidence on which the Court ought to find that there was a serious claim in fact made, and whether a contract to abandon that claim was the consideration for this letter of guarantee. I am not going into the question at present as to how far the *Statute of Frauds* will raise any difficulty in the way. And I think also that the mere fact of an action being brought is not material except as evidence that the claim was in fact made. That, I think, was laid down by Lord *Blackburn* in *Cook* v. *Wright*, and also in *Callisher* v. *Bischoffsheim*, and, subject to the question whether these cases are overruled, or ought to be considered as unsound, that, I think, is a correct statement of the law. Now, by "honest claim," I think is meant this, that a

(1) 17 Ch. D. 480.
(2) Law Rep. 5 Q. B. 449.
(3) 20 W. R. 116.
(4) 1 B. & S. 559.

C. A. 1886 MILES v. NEW ZEALAND ALFORD ESTATE CO. Cotton, L.J.

claim is honest if the claimant does not know that his claim is unsubstantial, or if he does not know facts, to his knowledge unknown to the other party, which shew that his claim is a bad one. Of course, if both parties know all the facts, and with knowledge of those facts obtain a compromise, it cannot be said that that is dishonest. That is, I think, the correct law, and it is in accordance with what is laid down in *Cook* v. *Wright* (1) and *Callisher* v. *Bischoffsheim* (2) and *Ockford* v. *Barelli* (3). What was stated in *Cook* v. *Wright* (4) by Lord *Blackburn* is this: "We agree that unless there was a reasonable claim on the one side, which it was *bonâ fide* intended to pursue, there would be no ground for a compromise; but we cannot agree that (except as a test of the reality of the claim in fact) the issuing of a writ is essential to the validity of the compromise." Again, what his Lordship says in the subsequent case of *Callisher* v. *Bischoffsheim* (5) is this: "If we are to infer that the plaintiff believed that some money was due to him, his claim was honest, and the compromise of that claim would be binding and would form a good consideration, although the plaintiff, if he had prosecuted his original claim, would have been defeated." The doubt of the Master of the Rolls seems to have been whether a compromise would not be bad, or a promise to abandon a claim would be a good consideration if, on the facts being elicited and brought out, and on the decision of the Court being obtained, it was found that the claim which was considered the consideration for the compromise was a bad one. But if the validity of a compromise is to depend upon whether the claim was a good one or not, no compromise would be effectual, because if it was afterwards disputed, it would be necessary to go into the question whether the claim was in fact a good one or not; and I consider, notwithstanding the doubt expressed by the Master of the Rolls, that the doctrine laid down in *Cook* v. *Wright* and *Callisher* v. *Bischoffsheim* and *Ockford* v. *Barelli* is the law of this Court.

Now was there here any claim in fact made on behalf of the company against *Grant*, and was there, in fact, anything which

(1) 1 B. & S. 559.
(2) Law Rep. 5 Q. B. 449.
(3) 20 W. R. 116.
(4) 1 B. & S. 569.
(5) Law Rep. 5 Q. B. 452.

would bind the company to abandon that claim. The conclusion at which I have arrived is, that there is no evidence on which we ought to rely that there was in fact a claim intended to be made against *Grant*, and, in my opinion, on the evidence before us, we ought not to arrive at the conclusion that there was ever intended to be any contract by the company, much less that there was in fact any contract binding the company that that claim should not be prosecuted, and should be given up. [His Lordship alluded shortly to the facts of the case, and continued:—] Now, undoubtedly, on the evidence, several of the shareholders present at the general meeting of the 15th of March, 1883, expressed a very hostile feeling against Mr. *Grant*, who had sold the property to the company; that is admitted by him, and is in my opinion clear. But then what was done? There is nothing at all on the face of this letter of guarantee, as I have already stated, which says that it was given by *Grant* in consequence of the company giving up any claim they might have against him, and there is nothing whatever in the minutes of the board which states in fact that this was so, nor is there anything after that time in the minute of the board of directors which can be referred to as shewing an agreement by them to give up any claim they otherwise intended to prosecute against him. What I should say was the state of the case is this—there was angry feeling, and Mr. *Grant* thought it might result in proceedings being taken against him; and, therefore, what he considered the wisest course was to make this offer in the hope and expectation that he would keep things quiet, and let things go on peaceably.

Now, in my opinion, a simple expectation, even though realised, would not be a good consideration for the promise which he gave. In order to make a good consideration for the promise there must be something binding done at the time by the other party, there must be something moving from the other party towards the person giving the promise. In my opinion, to make a good consideration for this contract it must be shewn that there was something which would bind the company not to institute proceedings, and shewn also that in fact proceedings were intended on behalf of the company; and, in my opinion, I cannot

C. A. 1886 MILES v. NEW ZEALAND ALFORD ESTATE CO. Cotton, L.J.

come to the conclusion as a matter of fact that these two things existed. It is true that directors were present at the meeting, and that their guarantee was entered on the minutes, but although this was the case, it cannot in my opinion be considered that the directors by being there entered into any contract as directors not to enforce the claim of the company. The proper mode of proving any agreement made by the directors would be the production of evidence of its having been made at a meeting held by them as the persons having the conduct of the business of the society. No doubt, they might, if they had been so minded, at a meeting of the board agree that they should not make any claim against him in consideration of this having taken place, but I find nothing of that kind.

Again, this is an incorporated company, and even if any statement had been made at this meeting that no proceedings should be taken, yet to bind the company there ought to be something done by way of a resolution, and mere statements by individual members that they were satisfied with this guarantee would not in any way bind the company so as to prevent them from taking proceedings if they ever intended to do so. In my opinion this promise was given in the expectation that this would be a sop to the angry shareholders, and that no proceedings would be taken. The mere fact that none have been taken, will not in my opinion make that a consideration, unless (putting aside the question as to the company being bound) something was done or said in such a way as to be the action or saying of the company, that if this guarantee was given no proceedings would be taken. Of course if this company were an individual, and the individual made a representation that if this guarantee was given he would take no proceedings, that would be a contract binding him, but in my opinion if a company is to be bound, it ought to be bound by some more formal proceedings, either by the action of the directors sitting as such, or by something equivalent to a resolution of the shareholders in general meeting.

Mr. Justice *North*, although he decided in favour of the Plaintiff, has held that there was sufficient consideration for the guarantee; and if he had come to the conclusion that there was upon the evidence before him that which amounted to a

contract binding the company, then I should undoubtedly feel some difficulty, because he had a better opportunity of judging of the evidence than we can have. But, on reading his judgment, I come to the conclusion that he rather considered there was an expectation then that this would be the result, and that if that expectation was performed and completed, this would be enough to give a consideration.

Undoubtedly, the evidence of Mr. *Grant* cannot be considered very satisfactory, and it is not very satisfactory to find that Mr. *Redmayne*, the secretary of the company, who was the witness on the other side, was not cross-examined, but, looking at the evidence of Mr. *Redmayne*, I cannot see that he states as a fact that there was an intention to take proceedings, or, as a fact, that anything took place at the meeting which could be considered as a representation by the company, or by the directors, or by any of those present, that these proceedings, in fact intended, should be abandoned.

[His Lordship then read paragraph 4 of Mr. *Redmayne's* affidavit, and continued:—]

Now, it was admitted by the counsel for the company that what is there referred to is the resolution passed at the meeting of the directors on the 22nd of January, and we see what the witness turns it into in his affidavit. That is his strongest statement. He does say, indeed, in par. 5 that at the meeting of the company on the 15th of March, 1883, *Grant* "was told that it was the intention of the Defendant company to take immediate proceedings against him," but he does not say it was so intended, and the remainder of this paragraph is expressed in doubtful terms, so that, in my opinion, we ought not to rely upon that evidence as proving that anything took place at the meeting amounting to a contract binding the company to abandon proceedings which were, in fact, intended to be brought. And, in my opinion, it was necessary to establish that there was a claim in fact made and abandoned. Mr. Justice *North* relies very much upon the consideration that no action was in fact brought. But I think it is hardly necessary to deal with that, for it may be that this sop was sufficient to calm the angry spirit; and the fact that no action was brought does not shew that there was any contract not to bring an action.

C. A. 1886 — MILES v. NEW ZEALAND ALFORD ESTATE CO. — Cotton, L.J.

Mr. Justice *North* seems to have been much pressed by the consideration that Mr. *Grant* always looked upon this as a binding agreement. How far Mr. *Grant* was aware of the law as to consideration one does not know, but undoubtedly he did not intend the guarantee to be illusory; undoubtedly he looked upon it as a promise, and it has been argued that he would not have made this promise unless he got something for it. In my opinion, however, the evidence shews that he did not regard it as a contract.

I come accordingly to the conclusion that there is, in fact, no consideration to support the guarantee on which the company rely, and to make it a contract binding on Mr. *Grant;* and as I have come to the conclusion that there was not sufficient consideration to support the promise, it is not necessary for me to enter into the question as to the *Statute of Frauds.*

BOWEN, L.J.:—

With regard to the point of law on which this appeal was opened by Mr. *Barber*, I agree with what has been stated by my Brother *Cotton*, that *Bradford Banking Company* v. *Briggs & Co.* (1) laid down two propositions. It was admitted in argument by Mr. *Stirling* that, if the first proposition which appears to be laid down by that case really was laid down, then it was impossible in this Court, whatever view might be taken by a higher tribunal, that the point of law decided by the learned Judge below and covered by the *Bradford Case* could be maintained. On that point, therefore, the appeal must succeed.

But then comes this further important question. Mr. *Davey* endeavoured to support the decision appealed from on a question of fact, by displacing upon the evidence the verdict passed by Mr. Justice *North* which, so far as that question of fact is concerned, was against him. Therefore we have to determine whether or no there was any consideration for this guarantee, and it is upon that point that I am, with great regret, obliged to state that my opinion is at variance with the view at which Lord Justice *Cotton* has arrived. The inquiry whether there was or

(1) 31 Ch. D. 19.

was not consideration for this guarantee renders it necessary to say some words upon the law, and then to apply the law to the question of fact.

Speaking broadly, what has to be determined is, in my opinion, whether there was at a critical moment any forbearance to press a real claim on the part of the company, or of the directors of the company, who had ample powers under their articles of association to act for the company, and, if so, whether such forbearance was brought about by the express or implied request of Mr. *Grant*, and in consideration of his guarantee. A valuable consideration may, of course, either consist of some right, interest, profit, or benefit which accrues to one party, or some forbearance, or detriment, or loss, or responsibility, which is given to or undertaken by the other. We have to see here in the first place whether there was forbearance promised, in which case the promise would be the consideration for the guarantee, or whether there was an actual forbearance given at the request of the guarantor and in return for something. The two views run very close together. If the directors, in consideration of this guarantee, made an actual agreement to forbear, they really took the agreement in accord and satisfaction of any claims, if there were claims, and beyond that agreed not to prosecute the question whether there were any; but such an agreement as that need not be in writing. It seems to me there is no magic at all in formalities, and that there would be ample evidence of such an agreement, if this guarantee to the knowledge of both parties was given and accepted upon the understanding that no proceedings should be instituted. But I do not accept the proposition that this guarantee cannot be effectual and supported by consideration unless there is at the moment it was given something to bind the company. If the guarantee were given on the condition and on the contingency that there should be forbearance, and was taken upon that condition, and upon that contingency, and the contingency afterwards happened, then the forbearance when given, being at the request expressed or implied of the guarantor, would furnish an implied consideration for the guarantee which had already been given. That is, I think, no new law. In *Oldershaw* v. *King* (1) there

(1) 2 H. & N. 399, 517, 520.

C. A. 1886 MILES v. NEW ZEALAND ALFORD ESTATE CO. Bowen, L.J.

was a guarantee given to the following effect: "I am aware," said the guarantor, "that my uncles Messrs. *J. & J. F. King*, stand considerably indebted to you for professional business, and for cash lent and advanced to them, and that it is not in their power to pay you at present, and as in all probability they will become further indebted to you, though I by no means intend that this letter shall create or imply any obligation on your part to increase your claim against them, I am willing to bear you harmless against any loss arising out of the past and future transactions between you and my said uncles to a certain extent, and therefore in consideration of your forbearing to press them for the immediate payment of the debt now due to you, I hereby engage and agree to guarantee you the payment of any sum they may be indebted to you upon the balance of accounts between you at any time during the next six years, to the extent of £1000, whenever called upon by you to pay the same, and after twelve calendar months' previous notice." In that case, *Erle*, J., expressed himself in the following language: "Looking at the whole letter, and the circumstances under which it was written, and considering the importance of further advances, I come to the conclusion, that the consideration contemplated was, that further advance should be made, and time given by the creditor before he would press for the payment of the existing debt. Though the contract did not bind the creditor to make further advances, or to give time unless he chose to do so, it is clear that if he did make the advances and did give time, that which was contingent at the time when the instrument was written became an absolute and binding contract." The same principle was applied in the case of the *Alliance Bank* v. *Broom* (1). "It appears to me," said the Vice-Chancellor (2), "that when the plaintiffs demanded payment of their debt, and, in consequence of that application, the defendant agreed to give certain security, although there was no promise on the part of the plaintiffs to abstain for any certain time from suing for the debt, the effect was, that the plaintiffs did, in effect, give, and the defendant received, the benefit of some degree of forbearance; not, indeed, for any definite time, but, at all events,

(1) 2 Dr. & Sm. 289. (2) 2 Dr. & Sm. 292.

some extent of forbearance." So it will be sufficient here that the directors did forbear, if their forbearance was at the request expressed or implied of the guarantor and in consequence of his guarantee being given, and it seems to me there is no sort of necessity to discover language of any particular form, or writing of any particular character, embodying the resolution of the directors. We must treat the thing in a business way and draw an inference of fact as to what the real nature of the transaction was as between business men. But an attempt was made to shew that the forbearance was worth nothing. Of course forbearance of a non-existing claim would not be forbearance at all. We were referred to the language of the Master of the Rolls in the case of *Ex parte Banner* (1), which seems to throw doubt upon the doctrine which has more than once been laid down in the Courts of Common Law, and finally in the well-known case of *Callisher* v. *Bischoffsheim* (2). It seems to me that if an intending litigant *bonâ fide* forbears a right to litigate a question of law or fact which it is not vexatious or frivolous to litigate, he does give up something of value. It is a mistake to suppose it is not an advantage, which a suitor is capable of appreciating, to be able to litigate his claim, even if he turns out to be wrong. It seems to me it is equally a mistake to suppose that it is not sometimes a disadvantage to a man to have to defend an action even if in the end he succeeds in his defence; and I think therefore that the reality of the claim which is given up must be measured, not by the state of the law as it is ultimately discovered to be, but by the state of the knowledge of the person who at the time has to judge and make the concession. Otherwise you would have to try the whole cause to know if the man had a right to compromise it, and with regard to questions of law it is obvious you could never safely compromise a question of law at all. With regard to the observations of the Master of the Rolls in *Ex parte Banner* I should like to point out in respect to *Callisher* v. *Bischoffsheim* in the first place that whatever be the objection taken to the language of the Court in that case, in any point of view the case was rightly decided. The plea there only denied the existence of the debt, and left it on the record undisputed that the debt might have been put forward

(1) 17 Ch. D. 480. (2) Law Rep. 5 Q. B. 449.

C. A. 1886 MILES v. NEW ZEALAND ALFORD ESTATE CO. Bowen, L.J.

reasonably as a substantial claim. But with regard to the language of the Court in *Callisher* v. *Bischoffsheim* (1) I confess it seems to me that the language of Lord *Blackburn* was correct, that the decision in *Ockford* v. *Barelli* (2) was right, and that the language in *Cook* v. *Wright* (3) is equally unimpeachable. When the Master of the Rolls in *Ex parte Banner* (4) says he doubts, if there was really and obviously no cause of action, whether the belief of the parties that there was, would be sufficient ground for a compromise, I agree if by that he means there must be a real cause of action, that is to say, one that is *bonâ fide* and not frivolous or vexatious; but I do not agree if he means by a real cause of action some cause of action which commends itself to the ultimate reasoning of the tribunal which has to consider and determine the case.

Now that being the law which I think has to be applied to the present case, I come next to the facts. Was there here forbearance of a *bonâ fide* claim? I cannot help beginning the observations which I make upon the facts by saying that it seems to me it is too late for the Respondent to suggest that the claim put forward by the company is not *bonâ fide*, when he deliberately abstains from cross-examining the secretary upon his affidavit. What are the alternative views between which we have to decide as to the consideration given for this document? A vendor and promoter, or alleged promoter, of a company (Mr. *Grant* denies in his affidavit that he took an active part in the promotion of the company), the vendor, at all events, to a company which was formed for the purpose of purchasing from him, who is also a director and chairman of the company, at a stormy meeting gives a document by which he professes to incur serious liability to the company, and gives it for no consideration whatever except the hope of pacifying people who were at the meeting of the shareholders of the company. That is one view. The other is, that he really gave this document as a business transaction. Mr. *Grant* was vendor to the company of this *New Zealand* estate, which he had two or three days previously to its incorporation purchased from Mr. *Tooth*. The acquisition of this estate was substantially the object of the formation of the company. The secretary of the company indeed

(1) Law Rep. 5 Q. B. 449.
(2) 20 W. R. 116.
(3) 1 B. & S. 559.
(4) 17 Ch. D. 480.

tells us that Mr. *Grant* took an active part in the formation of the company, but I lay no great stress upon that, because it is denied by Mr. *Grant*. At all events Mr. *Grant* became a director, took 125 shares, and subsequently was chairman of the board. In November, 1882, the estate having been purchased apparently upon representations as to the amount of labour expended upon the property in *New Zealand* and the sum to be paid in wages, I find the secretary writing to Mr. *Grant* in a tone of complaint as to the extraordinary amount that had been paid in wages by the company, and expressing the opinion that there would be great indignation by the shareholders when they compared the actual sum which had been expended with the representations that had been made to them. In December he is instructed to write to Mr. *Grant* and to say "The directors consider it due to themselves and the shareholders, as well as to Mr. *Grant*, that some explanation should be given of the glaring discrepancy, for on the strength of such statements the estate has been bought." To that Mr. *Grant* replies, and replies, for anything I know, with perfect accuracy, that the statements he had given the company had been verbatim copies of those supplied to him by Mr. *Tooth*; that the statements related to a previous year's account; that Mr. *Tooth* had got them from the local manager of the place; and that Mr. *Grant* had no means any more than the secretary himself had of verifying the correctness of the letters. This correspondence was placed before the board, and notice to that effect was entered upon the minutes. On the 22nd of January, 1883, the dissatisfaction broke out, so to speak, into a blaze. Mr. *Grant* attended a meeting of the directors, but left it at an early period; and after he was gone this resolution was passed: "That the balance sheet for the year ending 1882 having disclosed serious misrepresentations on the part of Mr. *Grant* when the estate was purchased by the company, in order to avoid legal proceedings, the estate be offered to Mr. *Grant* at such a price as to recoup the shareholders the amount of principal and interest invested in the company, together with the expenses connected with the estate from the time of purchase." This resolution was passed by the directors, and was communicated in the letter of the 25th of January, 1883, by the order of the directors, through

C. A. 1886 MILES v. NEW ZEALAND ALFORD ESTATE CO. Bowen, L.J.

the secretary to Mr. *Grant*. I confess I cannot, especially in the absence of any cross-examination of the secretary by the Respondent's counsel, myself view this resolution as anything except a resolution of the most serious character. Mr. *Grant* replies again to the same effect, that the statements which he had given were Mr. *Tooth's*, and in the course of this month and in the beginning of the next month some attempt was made to get from Mr. *Tooth* documents which apparently bore upon the previous accounts of the company. Mr. *Redmayne* promised to lay Mr. *Grant's* answer before the directors. As far as I can see, there was a meeting of the directors in February, at which three directors attended, though I can see no trace in the minutes of any discussion on this correspondence. But on the 15th of March came the meeting which is the critical point to which we have really to direct our attention in weighing the evidence before Mr. Justice *North*. At this meeting a report was read which again refers to misleading statements in respect of the company's property, and from the minute of the meeting in the company's book it appears that there was an angry discussion; and at the end of it, or during it, Mr. *Grant* signed an agreement which is set out in the minutes of the company. I turn to Mr. *Redmayne's* affidavit to see what he says about that meeting. [His Lordship then read the 5th paragraph of the affidavit of Mr. *Redmayne*, and continued:—]

This was a critical moment, if there was anything at all in the claims which were being put forward against Mr. *Grant*, because if the company delayed any longer it is clear that they never could with any chance of success bring an action for rescission. I do not in the least say whether they had any just ground for rescinding or not, but it seems to me to be obvious that they thought so, and it seems to me obvious that Mr. *Grant* was told that they intended to try the question, and if this affidavit of Mr. *Redmayne's* is true, that was the main subject that was discussed at that meeting. Now, on the other hand, what says Mr. *Grant?* Observe the strange and extremely ingenious course taken by the Respondent. He does not cross-examine Mr. *Redmayne*, who knows all about this, but he calls Mr. *Grant*, and what does Mr. *Grant* say? So far from impugning this affidavit, if you read Mr. *Grant's* cross-examination, as one has a right to

read the evidence given by persons who are under cross-examination, and whose memory is defective, and whose answers are somewhat doubtful, it seems to me really that that cross-examination strengthens one's opinion of the truth of this affidavit. He will not swear that at this very meeting Mr. *Jowett*, a shareholder, did not complain of misrepresentation at the time of the purchase. The correspondence between himself and Mr. *Redmayne*, in which he was distinctly told that the directors complained of his representations and offered him the option of escaping legal proceedings by repurchasing the estate from the company, was—he admits—read to the meeting. He admits that the resolution of the directors on the 22nd of January was read to the meeting. He does not recollect—that is all he will say—that another gentleman, Mr. *Crowther*, said he was glad proceedings were to be taken against him. He admits he had spoken to his own son, a solicitor, on the subject of the resolution of the 22nd of January, and he will not swear he did not tell the meeting so. He says indeed no proposition was put to the meeting about litigation, but he admits that shareholders hinted at contributing a large sum of money for litigation against him, and that he himself denied at the meeting having made the misrepresentation alleged. He admits that the agreement in which he undertook to guarantee the dividend to the company was read at the meeting, and he admits that from that time forward he never had once denied his liability to the company on the guarantee. Now, Mr. Justice *North* saw this gentleman under cross-examination, and was duly impressed, as I have been impressed, by the fact that the Respondent did not cross-examine the secretary of the company, and Mr. Justice *North* came to the conclusion that there was consideration for the guarantee. I read his judgment as finding that proceedings had been threatened, that Mr. *Grant* knew that they had been threatened, that he gave the guarantee in order to put an end to them, and that the proceedings were dropped in consequence of his giving that undertaking. If that is a true view of the finding of Mr. Justice *North*, I should say that I agree with it as far as I can upon these imperfect materials, although it is always difficult, if your materials are not complete, to come to a right conclusion.

C. A. 1886 MILES v. NEW ZEALAND ALFORD ESTATE CO. Bowen, L.J.

I should say I agree with him, but, at all events, if I did not agree with him I should feel myself unable to reverse his decision.

That is all I wish to say about the question of fact. It was, indeed, suggested that the *Statute of Frauds* applied in this case, and that the agreement, not being one which was to be performed within a year, ought to be in writing, or else it was void. The answer to that is that an agreement which is to be performed on one side within the year does not require to be in writing under the statute. If the view of the Act I have taken is correct, the consideration for the guarantee was the immediate forbearance at a critical moment of the prosecution of the company's claim, and therefore the *Statute of Frauds* does not militate against the case of the Appellants, but in any event I think that the doctrine laid down by Lord *Blackburn* in *Maddison* v. *Alderson* (1) must apply. A verbal agreement, if executed, is accord and satisfaction. The only effect of the *Statute of Frauds* is to prevent the active prosecution of claims in the Law Courts which are not supported by written evidence at the trial.

In conclusion I only wish to say I have gone through the case at such great length as I have done, because I feel the greatest possible reluctance in differing from my Brother *Cotton*. I am thankful to think I am only differing from him upon a question of fact, but as I do differ and differ very decidedly upon it, it seemed to me the parties had a right to expect I should give my reasons at full length for so differing, and therefore my observations have been of greater length than they would otherwise have been.

FRY, L.J.:—

There are two questions which arise for decision in this case, one of such being the question which was involved in the previous case of *Bradford Banking Co.* v. *Briggs & Co.* (2) Mr. Justice *North* followed that case according to its then position, and I think that we are bound to follow that case in its present position, being a decision of the Court of Appeal. I say that because, although I was party to the decision, I did not express either dissent from

(1) 8 App. Cas. 467, 488. (2) 31 Ch. D. 19.

or assent to the larger proposition which certainly governs this case. The second question is the one upon which so much difference of opinion has arisen upon the bench.

Now it appears to me that we must consider in the first place what are the allegations made by the parties in this litigation.

The reply in the first place alleged that no consideration was given for the guarantee, and that was met by the rejoinder which stated with precision the consideration upon which the company relied. [His Lordship then read the rejoinder and continued:—] Now it is to be observed the thing relied on is the abandonment and giving up, in fact the release of the claims of the company and of the individual shareholders. The case which was made was not one of a request for forbearance for a limited time or for any stated time, followed by actual forbearance. In this case we are told, and no doubt accurately, that these pleadings were put in after litigation as to whether the point should be allowed to be raised. They were put in more than a year after the defence was put in, and therefore it is impossible to doubt that the statement in the rejoinder is the well-considered allegation of the company as to the consideration upon which they think themselves entitled to rely.

Now, the next inquiry which arises is this, what is the law which bears upon this question; and I am glad to think that whatever difference there may be between us upon other questions there is no difference as to the general principle of law applicable to this case. In my opinion when a real claim has been made and there is a *bonâ fide* compromise, that is sufficient consideration. I think the law was concisely stated in the case of *Cook* v. *Wright* (1), when the Court, dealing with the case before them, said: "The real consideration therefore depends, not on the actual commencement of a suit, but on the reality of the claim made and the *bona fides* of the compromise." I am quite aware that the Master of the Rolls has expressed certain doubts as to whether there must not be in the mind, I suppose of the Court which ultimately tries the question, a doubt as to the contest between the parties; but I cannot follow the learned Master of the Rolls in that view. I do not think the policy of the Courts is to prevent real *bonâ fide* compromises of real and *bonâ fide*

(1) 1 B. & S. 559, 570.

C. A. 1886 MILES v. NEW ZEALAND ALFORD ESTATE CO. Fry, L.J.

claims. When there is a pending action it is easy to suppose that the giving up of that action is the consideration for the compromise. Again, when there is a real cause of action slight evidence of the claim being made may be admissible, and again, when there is a real belief in a cause of action on both sides slight evidence of the claim being made may go in support of the reality of the claim. But in my judgment none of those circumstances can be laid down as absolutely essential to the validity of a compromise. Of course if neither party believes in the reality of the claim, it is obvious it is a sham. I do not desire to say anything more than that in my judgment when a real claim is made and is *bonâ fide* compromised, that is ample consideration.

Now in the present case was there any real cause of action or any evidence of belief on the part of the company that there was any cause of action? Or, again, was any claim really made against Mr. *Grant* by the company? [His Lordship then referred to the evidence on these points and came to the conclusion that there had been no misrepresentation by *Grant*, no real belief of the company or its officers of any real cause of action against him, and no *bonâ fide* claim on the 15th of March pending by the company against *Grant*. His Lordship then continued:—] But was there any claim by a shareholder? There is not the slightest trace of that. It is not suggested that any shareholder had been advised to make any claim, or, except the angry words that passed at the meeting, that he had ever asserted a claim; and I am bound to say I do not look upon the angry words which passed upon that occasion as anything serious, as anything indicating a cause of action, or the existence of a belief of a cause of action. But supposing there was this real claim, was there, to use the language of the pleadings, any agreement on the part of the company and the shareholders to put an end to the contemplated proceedings and to give up their claim? Now if there was any such agreement it is very remarkable that the document is absolutely silent about it. It was suggested it would be unpleasant to Mr. *Grant* to insert words indicating that there was any such claim, but any such sensibility was out of place after the angry discussion which had occurred: and general words might have been inserted which would not wound the sen-

sibility of the most sensitive man, and yet might have the effect of shewing that the directors intended to insist upon their rights. But not only is there no mention of it in the agreement itself, there is no mention of it in the minute book which contains the angry discussion. Lastly, it seems to me strange if the company had intended to give up their claims, that no resolution was passed at the meeting to express the desire of the meeting that the company should give them up. I think, therefore, the circumstances of the case are very strong to shew that there was no intention whatever on the part of the company to abandon any claim they might have. With regard to the individual shareholders, can it be said that they by being present at the meeting, some of them silent, not taking part in the discussion, were giving up their individual causes of action, supposing they existed? And observe, giving them up whilst the shareholders who were not at the meeting would retain their causes of action, if they had any. How can it be said therefore that there was any agreement to give up the claims of all the shareholders for whose benefit the agreement was entered into? It seems to me that there is strong evidence to shew that there was no intention on the part of the shareholders to give up their rights. Therefore, looking at the circumstances of the case it appears to me impossible to conclude that the shareholders intended to give up anything, or that the company intended to give up anything. But then it is said that Mr. *Redmayne's* affidavit is precise, and that as Mr. *Redmayne* was not cross-examined it is impossible for this Court to come to a conclusion different from that of Mr. Justice *North*. Now I confess that has been to my mind the principal question of difficulty in this case, and I should have been better pleased if Mr. *Redmayne* had been cross-examined. At the same time it must be borne in mind that the onus of proof is on those who make an assertion. I do not impute bad faith to Mr. *Redmayne*, but his statements are not literally accurate. [His Lordship then referred to this affidavit and came to the conclusion that it did not contain statements of fact sufficient to support the contention that has been made. He then continued:—]

Now another difficulty which must be referred to is this, that the abandonment of claims mentioned in the affidavit by the

C. A. 1886 MILES v. NEW ZEALAND ALFORD ESTATE CO. FRY, L.J.

company is their abandonment, if any such there was, by an incorporated society, a body whose proceedings are regulated by the requirements of the *Companies Act*, and who must proceed with a certain amount of regularity and formality. It is to be observed, as I have already said, there is no document on the part of the company indicating any intention to give up their claim. There appears to have been no resolution of the directors to give it up, there is no discussion as to whether they shall give it up, there is no resolution at the meeting of the 15th of March as to whether they shall give it up; and that to my mind is strong to shew that there was no intention to give it up. I think, therefore, it is impossible that the company can be bound by such an irregular discussion as seems to have taken place on the 15th of March. Lastly, it has been urged upon us that the conduct of both the parties shewed they thought that the consideration was sufficient. It is said that Mr. *Grant* treated his undertaking as serious. If he was a man of honour he would have treated it seriously: in all probability if his affairs had not gone into liquidation he intended to honour, and would have honoured that undertaking, which, whatever its legal force, was binding upon him in honour. I think the true result of the evidence is to shew that there was an expectation in the mind of Mr. *Grant* that if he gave this document no proceedings would be taken against him, that there was an expectation in the minds of many of those who were present, if they got this dividend they would take no proceedings; but it appears to me it is not right or competent for the Court to turn an expectation into a contract, and that is what I think we should do if we gave effect to this as a valid contract.

The result is the majority of the Court, while differing from the Judge on both the points, affirms the decree.

Their Lordships then made a declaration that the Plaintiff was entitled to a charge upon the shares of *Grant*, free from any claim by the Defendant company under the letter of guarantee of the 15th of March, 1883, and dismissed the appeal with costs.

Solicitors: *Sharpe, Parkers, & Co.*, agents for *Weston & Hemingway, Leeds; Steavenson & Couldwell.*

W. W. K.

## *In re* CHESHIRE BANKING COMPANY.

### DUFF'S EXECUTORS' CASE.

C. A.
1885
KAY, J.
*Nov.* 7.
C. A.
1886
*March* 23.

*Company—Amalgamation—Exchange of Shares—Executors—Contract to take Shares—Personal Liability.*

Upon the amalgamation in 1882 between the *S.* and *C.* banking companies, *A.*, a holder of 100 shares in the *S. Bank*, received a circular asking whether he would exchange his shares in the *S. Bank* for shares in the *C. Bank*, which took over the business of the other.

*A.* died shortly afterwards without having sent any reply to the circular. On the 27th of February, 1883, a letter was sent on behalf of *A.'s* executors to the *C. Bank* "enclosing certificate for 100 shares of the *S. Bank* in the name of" *A.*, "and will thank you to let us have shares in your bank in exchange." On the 28th of February the manager replied that when probate had been exhibited to the *London* agents of the bank he would send share certificates in the bank "in the name of the executors individually." A certificate was made out to the executors of 100 shares in the *C. Bank*, and an entry made in the share register with the description, "executors of *A.*" The executors wrote that they objected to have the certificate in their names, and requested the bank to forward them one in the name of *A.*

The directors accordingly ordered the certificate to be cancelled and one made out in the name of *A.* for 100 shares.

On summons by the liquidator for rectification of the register by striking out the name of *A.*, and putting in place of it the names of the executors as holders of the 100 shares:—

*Held*, that the letters of the 27th and 28th of February constituted by application and acceptance a completed contract between the executors and the bank that 100 shares should be taken in the names of the executors individually, and further, that such completed contract was not, and could not have been, afterwards rescinded by the company.

Order of *Kay*, J., rectifying the register affirmed.

THE *Cheshire Banking Company*, now in liquidation, was incorporated in 1882, and in September of that year took over the business of the *Staffordshire Union Banking Company*, in which the late *William Duff* held 100 £20 shares, upon which £5 had been paid. In December, 1882, a circular was sent to him, in common with the other shareholders, asking him whether he would accept shares in the *Cheshire* in lieu of his shares in the *Staffordshire Bank*. *Duff* did not reply to this circular, and he died on the 29th of December, 1882, without having exercised

C. A. 1886 DUFF'S EXECUTORS' CASE.

his option of accepting shares in the *Cheshire Bank*, and having by his will appointed *Muttlebury*, *Bridges*, and *Watts* his executors, by whom the will was proved on the 9th of February, 1883. On the 27th of February, 1883, the firm of *Duff*, *Bridges*, & *Watts*, notaries in *London*, in which *Duff* had been a partner and *Bridges* and *Watts* were the surviving partners, wrote to the manager of the *Cheshire Banking Company*:—"Herewith we send certificate for the 100 shares of the *Staffordshire Union Banking Company* in the name of our late senior, *W. Duff*, and will thank you to let us have shares in your bank in exchange. We shall be glad if you will inform us when we may produce the probate in *London*, in order to avoid the risk of sending same by post." Then followed the names and addresses in full of the three executors, with a postscript: "When writing to us please let us know the market price for your shares, as we cannot get a quotation on the market here," and the letter was signed "*Duff*, *Bridges*, & *Watts*." This letter was answered by the manager of the bank on the 28th of February, 1883, as follows:—"Be good enough to exhibit the probate to our *London* agents, Messrs. *Fuller* & *Co.*, and ask them to certify production and advise us. When this has been done, we shall send you share certificate in this bank in the name of the executors, individually." A certificate of the issue to *Muttlebury*, *Bridges*, and *Watts* of 100 shares in the *Cheshire Banking Company* was soon afterwards made out, and an entry was made in the shareholders' register, in which the three were entered as shareholders, being described as "executors of *William Duff*, deceased." On the 5th of March the firm, in reply to the manager's letter of the 28th of February, and after stating that they had exhibited the probate to *Fuller* & *Co.*, who from not having any advice about it declined to mark it as exhibited, wrote: "We would prefer the certificate being made out in Mr. *Duff's* name;" and on the 6th of March the manager wrote: "Agreeably with your request we enclose you a certificate of 100 shares, £5 paid, in this company in exchange for one of like amount in the *Staffordshire Union Bank*, made out in the joint names of *William Muttlebury*, *John Bridges*, and *Charles Joseph Watts*, Esquires, and would thank you for an acknowledgment of same. We have now written Messrs. *Fuller* to receive your exhibit of probate, and would thank you

to re-present. The certificate was made out prior to the receipt of yours of yesterday." On the 7th of March the firm, in acknowledging the receipt of the certificate, wrote: "The executors object to have the share certificate in their names, and we shall therefore feel obliged by your forwarding us one in the name of Mr. *William Duff*." On the 21st of March, 1883, by order of the directors of the *Cheshire Banking Company*, the certificate in the name of *Duff's* executors was cancelled, and a certificate for 100 shares in the name of *William Duff* was issued.

On the 23rd of October, 1884, a resolution was passed for voluntarily winding up the company, and on the 25th of October it was ordered that the winding-up should be continued under supervision.

This summons was taken out on behalf of the liquidator for rectification of the shareholders' register, by removing therefrom the name of *William Duff* as the holder of 100 shares, and placing thereon in place of it the name of the three executors (*Muttlebury*, *Bridges*, and *Watts*) as holders of the shares.

The summons was heard before Mr. Justice *Kay* on the 7th of November, 1885.

*Hastings*, Q.C., and *S. Hall*, for the liquidator of the banking company:—

The correspondence shews that Mr. *Duff* had a right to shares in this banking company, and would have had them had he applied for an exchange, but he never did apply, therefore never became a shareholder, nor agreed to take shares in the company. After his death his executors applied for shares, and gave their own names, which were entered on the register by the manager. The contract was completed, and though an alteration was made in the register afterwards, the liquidator has acted rightly in restoring the names of the executors to the register, and calling upon them as contributories to pay the call made. It is submitted that they cannot escape liability.

[They referred to *Adams' Case* (1), *Fearnside and Dean's Case* (2), and *Spencer's Case* (3).]

(1) Law Rep. 13 Eq. 474. (2) Law Rep. 1 Ch. 231.
(3) 17 Beav. 203.

C. A.
1886
DUFF'S EXECUTORS' CASE.

*Kekewich*, Q.C., and *Grosvenor Woods*, for the executors :—

The utmost that the executors did was to ask for an exchange of one certificate for another, and that would not, under sect. 76 of the *Companies Act*, 1862, make them personally liable. Ought the executors to be made contributories in their representative character, so as to make them liable to the extent of assets in their hands?

[KAY, J., referred to *Buchan's Case* (1).]

There is no evidence of a binding obligation by the testator to take new shares, and there is none of a completed contract by the executors to take the shares in their own names, though their names were entered on the register. The Court will not hold that that is sufficient to complete a contract which will expose them to personal liability. The executors never intended to become personally liable, and the manager of the banking company adopted the course which they suggested of placing Mr. *Duff's* name on the register, which under sect. 76 of the *Companies Act*, 1862, could be done. Under any circumstances Mr. *Muttlebury* ought not to be held personally liable. If there be any liability it should be directed against the testator's estate.

[They also referred to *Jackson* v. *Turquand* (2) and *Mallorie's Case* (3).]

KAY, J. :—

In this case the testator after the amalgamation of a company in which he was a shareholder, had an option given, or rather an offer made to him, that he might exchange his shares in the company for shares in another company. He never accepted that offer. He never was bound to make the exchange; that seems to be clear upon the evidence. He died, having made his will, and appointed three executors. Now it was quite open to the executors to notify simply to the old company in which the testator was a shareholder that they were his executors, and that alone, according to the language of Lord *Selborne* in *Buchan's Case* (4), would not have authorized the old company to put the

(1) 4 App. Cas. 549, 583.
(2) Law Rep. 4 H. L. 305.
(3) Law Rep. 2 Ch. 181.
(4) 4 App. Cas. 594.

executors' names upon the register of shareholders in such a way as to make them personally liable. But there being no contract existing that the testator should become a shareholder in the amalgamated company the executors wrote the letter of the 27th of February, 1883, to the manager of the *Cheshire Bank*. [His Lordship read this letter.] Now of course the obvious observation upon that letter is that there might not have been authority from Mr. *Muttlebury*, who was not a partner with the other two executors in the firm of *Duff, Bridges, & Watts*, and that the letter might have been written without his consent. But if so nothing would have been easier than for Mr. *Muttlebury* to say so. He did nothing of the kind. On the contrary, he came to the Court saying that the correspondence was on behalf of all the executors, and I must so treat it. I have no doubt whatever, and can infer nothing else upon the evidence than that that letter was written with the authority and consent of Mr. *Muttlebury*; therefore I take it as a letter written by two executors with the consent of the third. The answer to the letter was by the manager on the 28th of February, in these terms:—[His Lordship read the letter]. What can be clearer than that?—We understand your application to be an application for shares in the names of the executors individually, and we shall send you a certificate in your individual names. The executors took no notice of that letter from the 28th of February to the 5th of March, except that they did shew the probate of the testator's will to the *London* agents; and they afterwards on the 5th of March wrote:—[His Lordship referred to the letters of the 5th, 6th, and 7th of March.] That came to this: the executors wished to enter into a new contract, a contract which never existed until they entered into it, a contract to take shares which the testator never contracted to take in this company. They could not in any way enter into that contract without making themselves personally liable. They could not make a dead man liable, and the only way of carrying the contract out was by putting their own names as holders of the shares to which the testator never had any right at all, and so making themselves personally liable. They evidently from their first letter intended that. They then said:—"Oh, it will be best, if we can, to make the contract and avoid personal

C. A. 1886 DUFF'S EXECUTORS' CASE. Kay, J.

liability." And to the bank:—"We will make the contract, but we ask you to put the shares into the name of *Duff*, who is dead." The bank had no power to do that, and if they had put the shares into the name of *Duff* that would not have exonerated the executors, because it was not *Duff's* contract at all; it was their contract. What happened afterwards could make no difference. The bank had made out the certificate, and entered the executors as holders of the new shares under their own contract, which was all they could do. Then, later, the bank acceded to the request made to them. They obliterated the names of the executors on the register and put on the name of *Duff*. But "*Duff*" was a fictitious name under the circumstances, meaning "the executors." The present case is not like the cases which have been referred to; where an executor merely notified to the company that he was the executor of a person who held shares, and did not thereby give authority to put his name on the register of shareholders. The present case is entirely different from those. This case is analogous—if there be any analogy—to cases in which executors applied for new shares in pursuance of an offer made to the testator, and not accepted by him, but by the executors. In those cases the decisions always have been that the executors and not the person who was dead, and who never made the contract, were the persons liable. In this case the contract was made by the executors—a contract which could only be carried out by putting their names on the register. Their names were improperly removed, and another name was substituted for them, and the register must now be rectified by striking out that name, and by placing thereon in its stead the names of the executors, the present Respondents, and they must pay the costs of the application.

T. F. M.

C. A.

From this decision the executors appealed. The appeal was heard on the 23rd of March, 1886.

*Kekewich*, Q.C., and *Grosvenor Woods*, in support of the appeal:—

We submit that the executors, if liable to be put on the list at all, are liable in their representative character only, and not

individually. The *onus* is on the liquidator, who seeks to affect them with personal liability in respect of these shares, of shewing that they ever entered into any personal contract to take the shares. We ask leave to adduce evidence for the purpose of shewing that the letter of the 27th of February, 1883, was written by *Watts* as a member of the firm only, without the knowledge and sanction of his co-executors *Muttlebury* and *Bridges*, and not as their agent.

[The Court declined to admit such evidence.]

Assuming that the correspondence shews that the executors individually, and not the firm only, applied for shares in the bank, there never was any binding completed contract to take the shares in their own names. There was no formal allotment of the shares to them, but only a resolution that certain certificates should be prepared and issued in the name of *Muttlebury* and others; and while the matter was still *in fieri*, so that the contract could be put an end to, the company received the letter giving notice that the offer to take the shares was made by them as executors only, and requesting that the certificate might be made out in the name of their testator. The mistake was recognised and rectified by substituting the name of the testator in the register for that of the executors, and the Court is entitled to consider the contract as rescinded by both parties: *Nicol's Case* (1). There was nothing *ultrà vires* in what was done by the directors, who before the allotment is formally complete have power to alter or annul it: *Hebb's Case* (2); to correct an evident mistake in the allotment: *Keighley's Case* (before Vice-Chancellor *Malins* 24 Jan. 1874, and before Lords Justices 25 Feb. 1874); or to release an agreement to take shares: *Thomas' Case* (3).

*Hastings*, Q.C., and *S. Hall*, for the liquidator, were not called on.

COTTON, L.J.:—

The point in this case is a very short one, and, in my opinion, turns on the two letters of the 27th and 28th of February

(1) 29 Ch. D. 421, 444, 447. (2) Law Rep. 4 Eq. 9.
(3) Law Rep. 13 Eq. 437.

C. A. 1886 DUFF'S EXECUTORS' CASE. Cotton, L.J.

1883. The three persons who have been placed on the register were the executors of Mr. *Duff*, who died on the 29th of December, 1882, and they proved at the beginning of February. On the 27th of February a correspondence begins, and we have the letter written, not by the executors, but by the firm in which the two surviving partners were two of the executors, the third not being a member of the firm at all. We must take it that that letter was written, though not by the executors, yet on behalf of the executors. We declined to receive further evidence shewing that that was not so, it having been treated before Mr. Justice *Kay* as a fact, and the letter seems to shew that the firm were really acting for the executors. The letter [which his Lordship read] is replied to on behalf of the *Cheshire Banking Company* acknowledging the receipt of the letter with the certificate enclosed, and then it goes on, "Be good enough to exhibit the probate to our *London* agents, Messrs. *Fuller & Co.*, and ask them to certify production, and advise us. When this has been done we shall send you share certificate in this bank in the name of the executors individually."

Now, to my mind, the question is whether those two letters constituted a contract between these two parties to take shares in their own names and to give them the shares in their own names. There is no doubt whatever that the acceptance is an acceptance of a supposed offer to take shares in the name of the executors individually, and that supposed offer is accepted. Was that really the offer which was made by the letter of the 27th of February? The wording of the letter is somewhat doubtful because it is:—"will thank you to let *us* have shares in your bank in exchange." The "us," no doubt, refers to the writers of the letter, not the executors, but somebody acting for the executors; and if it stood there I should think that what they were asking for was to have shares in the same names as the shares in the original company, the *Staffordshire Company*. But then it goes on, "The names of the executors are" so-and-so. Why were those names added? In my opinion those are the persons in whose names the shares are to be. The certificates of the shares are to be in the names of those persons. In other words, it is, "give us shares corresponding with the number in the

certificate in the names of these persons." That offer is accepted. Now there are two points to be considered here, or certainly one point, upon this letter. Production of the probate is offered in the first letter, and production of the probate is referred to in the second letter, and it is stated where the production is to be. Undoubtedly there would have been no shares allotted to these gentlemen unless they had shewn they were executors. It was contended there was no contract until they proved that they were executors. In my opinion that is a mistake. There was an offer made by "*Duff, Bridges, & Watts,*" as on behalf of the executors, an offer to produce proof that they were executors, and that proof was to be received. The proof was not to be antecedent to the contract, but the contract contained a condition that there should be a proof of their title. That prevents it being said there was no contract here. Then it is said the result of that is that they are to be liable, not individually, but only as executors. If the question had been what was their liability in the *Staffordshire Company* in respect of the shares, then they would have been liable as executors only, because they never became the holders of those shares. The testator was the holder, and though the executors after his death represented him, they would not represent him as shareholders, but as the persons on whom the law threw the liability for his shares to the extent of his assets. But if once shares are put into the names of executors individually, although they have a right of indemnity against the estate they are liable personally, with that right of indemnity, and they cannot say that their liability is to be only a liability to the extent of the assets of the testator. Then comes the question whether there could be an alteration of the certificate which was sent in accordance with the letter of the 28th of February. In my opinion that could not be done if there was once a complete contract. It is said that this contract was not complete until the letter was sent containing the certificate. But the answer is that the offer made by the letter of the 27th of February was accepted by the letter of the 28th of February, and that made a complete contract. The acceptance was not by sending the certificates; that was an act done in pursuance of a contract which had been completed by the offer of the 27th of February, and the accept-

C. A. 1886

DUFF'S EXECUTORS' CASE.

ance of the 28th of February. In my opinion the appeal fails, and must be dismissed with costs.

BOWEN, L.J.:—

I do not dissent from the opinion which has been expressed.

FRY, L.J.:—

In this case there are two questions—first, whether there is a concluded contract, and secondly; whether that has been put an end to by another contract for rescission. In my opinion there was a concluded contract effected by the letters of the 27th and 28th of February. It is contended that the letter of the 27th of February was written without the authority of one of the executors; but it is to be borne in mind that the firm of proctors affecting to act for the executors enclosed a certificate which was part of the executorship property, and it is going a long way to ask us to conceive that a firm, of which two members were executors, were misappropriating that property, as they would be doing if they were sending it without the consent of the third executor. It appears to me plain that that letter was written with authority. Then the question is one of construction. It is argued that the application is one in which the executors ask either that the dead man may be treated as a shareholder, or that they may be treated as shareholders, being liable in respect of the goods of their testator, but not in respect of their own personal property. Neither of such contracts is possible. No company can validly allot shares to a dead man, and no company can validly allot shares to persons who are not responsible to the extent of the whole of their property. If that was the nature of the application, it was perfectly idle. If it was an application to make themselves responsible to the full extent of their assets, but with a right of indemnity against the estate of the testator, then it was an intelligible and sensible application, and I think that was the true nature of the letter of the 27th of February. It appears to me that offer was accepted by the letter of the 28th, and that there was a concluded contract. It has been suggested that there was a condition precedent, viz., the production of the probate to the bankers. It is to be borne in mind that the letter

of the 27th of February offers to produce the probate in *London* at such place as the company may name, and the company in naming *Fullers'* are only acceding to the proposal contained in the previous letter.

Then if there was a concluded contract of the 28th of February by which the applicants undertook to take these shares, was that ever put an end to? I think not. Neither the applicants nor the company had a very accurate understanding as to what their relations were, and they bungled about the matter, but I cannot find any contract which put an end to the previous contract, and I think if the company had so contracted they would have done so without authority, for they had no right to rescind the contract for the allotment of the shares. I think the Court below was right, and that the appeal must be dismissed with costs.

Solicitors: *West, King, Adams, & Co; Gregory, Rowcliffes, & Co.*, for *Addleshaw & Warburton, Manchester.*

F. G. A. W.

---

## *In re* HUDSON'S TRADE-MARKS.



*Trade-mark—Registration of new Trade-mark—Absence of User prior to Application to register—Words common to Trade—Disclaimer of—Trade-marks Registration Act*, 1875 (38 & 39 *Vict. c.* 91), *ss.* 1, 2, 5, 6, 9, 10—*Patents, Designs, and Trade-marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 64, 74.

*H.* applied on the 28th of December, 1883, to register as a trade-mark a label surrounded by a pattern of ornamental design, and containing in the centre a rectangular black space, bearing the words "*Hudson's* Carbolic Acid Soap Powder," in white letters. On the outside of the rectangular space were other words descriptive of the purposes and advantages to be derived from the use of the Soap Powder. This label had not been used before the application:—

*Held*, that the application must be treated as being made under the Act of 1875, and the Court could not enforce, as a term of registration, disclaimer of the words "Carbolic Acid Soap Powder," which were common to the trade and merely descriptive—that Act having no provision similar to that contained in sect. 74 of the Act of 1883:

That the label was a distinctive label and capable of registration as a trade-mark under the Act of 1875, but that only the label as a whole could be claimed as a trade-mark, and that no right could be acquired by such

C. A.
1886
*In re* HUDSON'S TRADE-MARKS.

registration to the exclusive use of those common words, however long might be the user of them:

That whether under the Act of 1875 or of 1883, the fact of there having been no previous user did not prevent the registration—the Act of 1875 having effected a change in the law previously existing by making the mere act of registration, as regards any of the particulars specified in sect. 10, equivalent to the public user which before that Act was the essence of a trade-mark.

THIS was an appeal by *Charles Lowe* and *John Gill*, trading as *Calvert & Co.*, of *Bradford*, near *Manchester*, manufacturing chemists, from an order of Vice-Chancellor *Bacon*, made on the 23rd of July, 1885, upon an application of *William Creed* and others, the executors of *Robert Spear Hudson*, of *West Bromwich*, chemical manufacturer, allowing them to proceed with the registration of two trade-marks advertised under the Nos. 34,746 and 34,747, for Class 47, in the *Trade-marks Journal* of the 12th of March, 1884.

The trade-marks consisted of two labels which the said *Robert S. Hudson* had, on the 28th of December, 1883, applied to register for use on the boxes in which the packets of Carbolic Acid Soap Powder manufactured by him were sold. *R. S. Hudson* having died on the 6th of August, 1884, his executors were by the fiat of Chief Clerk, given on the 19th of December, 1884, substituted as applicants in the place of their testator.

Each label had printed on it in large white letters within a rectangular space in the centre of the label the words "*Hudson's* Carbolic Acid Soap Powder." The ground on which the letters were printed was black. On the right and left of the rectangular space was placed a trade-mark, previously registered by *Hudson*, consisting of the device of an arm grasping a dolly with the word "Trade-mark" under the elbow of the arm. Round the outside border of the label ran a pattern of ornamental design with other words printed stating the purposes for which the soap was applicable, and the beneficial effects arising from its use. Neither of these labels had been used by *Hudson* prior to his application for registration. Upon the original application for registration was a statement that "the words 'Soap Powder,' being words in common use in the soap trade, were in use but varied by other terms also common to the soap trade."

On the 6th of May, 1884, Messrs. *Lowe & Gill* gave notice to the Comptroller of opposition to the registration of the trade-marks on the ground that they had for many years been manufacturers and vendors of carbolic acid in various forms, including Carbolic Acid Soaps, and that the name of their firm was well known in connection therewith, and that the words proposed to be registered were not special and distinctive words within the meaning of the Act of 1883, but were merely descriptive, and as such not entitled to be registered.

On the 25th of June, 1884, *Hudson* delivered his counter-statement to the effect that *Calvert & Co.* were not manufacturers of Carbolic Acid Soap Powder, which was a different preparation from that known as Carbolic Acid Soap, and was a preparation invented and manufactured solely by him, and that the proposed trade-mark strictly complied with the requirements of sect. 64, sub-sects. 1 and 2 of the Act of 1883.

Evidence was filed both on behalf of the Applicants and their opponents, and the Court of Appeal came to the conclusion, from the line of cross-examination of the opponents' witnesses, that the object of the Applicants was to claim and acquire the right, on the ground that *Hudson* was the first maker of Carbolic Acid Soap Powder, to the exclusive use of the words "Carbolic Acid Soap Powder."

It also appeared that *Calvert & Co.* had, before the matter came into Court, expressed their willingness to withdraw their opposition if the Applicants would disclaim all right to the exclusive use of the words "Carbolic Acid Soap Powder," but this suggestion was not acceded to.

*Cozens-Hardy*, Q.C., and *Chadwyck Healey*, for the Appellants:—

The trade-mark cannot be registered at all, or, if so, then the Applicants must make the disclaimer required by sect. 74 of the Act of 1883.

There is nothing distinctive in this proposed trade-mark, and all the words except "*Hudson's*" are merely descriptive of the article sold under that title. They are not a fancy name, and as such capable of registration under sect. 64. It is suggested, however, that to the distinctive device of the hand and dolly, the

C. A. 1886 *In re* HUDSON'S TRADE-MARKS.

existing trade-mark, the words may be added under sect. 74 (*b.*); but then by sub-sect. 2 of that section, the right to the exclusive use of those common words must be disclaimed. There is no authority defining the meaning of "distinctive," within sect. 64, though there is under the analogous section (10) in the Act of 1875: see *In re Anderson's Trade-mark*, in the Court of Appeal (1), affirming *Chitty*, J. (2), and in that case (3) Mr. Justice *Chitty* held that the words "or otherwise," in sect. 6 were sufficient to exclude the registration as part of a trade-mark of words which are merely descriptive. "Distinctive" means that which distinguishes the goods of one manufacturer from those of another in the same class.

But under neither Act ought the label to be registered, as it was never used before the application. User is the essence of a trade-mark, and the Court of Appeal, without judicially deciding it, have expressed grave doubts whether a new mark can be registered under the Act of 1875: *Edwards* v. *Dennis* (4) and *In re Anderson's Trade-mark*.

*Aston*, Q.C., and *Macrory*, for the Respondents:—

This case must be tried under the Act of 1875. The application was pending when the new Act came into operation, and consequently that Act does not apply (sect. 113).

If the earlier Act applies no disclaimer can be required, there was no provision in that Act similar to that in sect. 74 of the later Act, nor if the later Act applied could it be required, for the disclaimer has to be made in the application. The opponents must then shew that the label, of which registration is asked, is so like another as to be calculated to deceive. The combination of words, though common by themselves, if so used as not to be calculated to deceive, may be registered. A person may register a distinctive device, and to that may be added words (sect. 6, sub-sect. 6) so long as they are not, by reason of any impropriety in the words themselves, open to the censure of the Court. What is sought to be registered is the whole label, and it is the whole

(1) 54 L. J. (Ch.) 1084.
(2) 26 Ch. D. 409.
(3) 26 Ch. D. 415.
(4) 30 Ch. D. 454.

combination of the words as they are proposed to be used, that is entitled to protection. But even if the case be within the Act of 1883, a label, a distinctive label—as that proposed to be registered, is equally entitled to registration as a trade-mark, sect. 64 (*c*); and by sub-sect. 2, any words, or combination of words, may be added, provided they do not fall under the prohibition of sect. 73.

Then the absence of prior user is under either Act equally immaterial. Prior to the Act of 1875 the proprietorship of a trade-mark was based on user, except under the *Hallamshire Acts*, under which the *Cutlers' Company* were entitled to grant, and did grant, marks which although new could be registered. But under the Act of 1875 registration of a mark, if it be a mark that could otherwise be registered as a trade-mark, is equivalent to prior user, and a trade-mark could exist from the moment of registration even without prior user. The Act draws distinctions between trade-marks existing at the date of the Act, and future trade-marks. There is throughout the Act no reference to the necessity of prior user, and, in fact, the practice ever since 1875 has been to register marks not previously used—as is clear from the statement by Sir *George Jessel* of the course of practice in *In re Worthington & Co.'s Trade-mark* (1). So, too, the form of application and of the declaration prescribed by the rules made under sect. 7 of the Act (2), clearly points to the possibility and habit of registering marks not previously used. There is nothing to prevent a man from asserting that he is lawfully entitled to the use of a trade-mark if no one else is entitled to it.

Then, again, under the Act of 1883, the form of application for registration (Sched I., Form F.) is silent as to user, except in the case of user prior to 1875, and no declaration is required. There is nothing in the later Act as to the necessity of prior user except sect. 75, which in effect legalises what Lord Justice *Cotton* defined as the effect of the earlier Act in *Mitchell* v. *Henry* (3). And that silence is significant, having in view the practice of

(1) 14 Ch. D. 8, 10.

(2) The rules in force at the date of the application were the rules of Feb. 21, 1883. For forms of application and declaration, see *Chitty's* Statutes, vol. vi. p. 665.

(3) 15 Ch. D. 181.

C. A. 1886 — *In re* HUDSON'S TRADE-MARKS.

registering new marks which had grown up under the earlier Act.

[*In re Leonard & Ellis' Trade-mark* (1); *Linoleum Manufacturing Company* v. *Nairn* (2); *Taylor* v. *Taylor* (3); *Holloway* v. *Holloway* (4) were referred to.]

*Cozens-Hardy*, in reply:—

There is nothing in either Act to exclude the necessity of that user which is the very essence of a trade-mark. In fact both sects. 1 and 2 rather point out the intention not to depart from the old law. The Registrar has to decide whether a person is entitled by law as proprietor of a trade-mark to register—that is to say, to be entitled to register he must be proprietor of that which only becomes a trade-mark by virtue of the prior user. It is true that when he is on the register he has not in bringing his action to prove his prior user, that is assumed unless his mark is removed from the register under sect. 5.

The *Cutlers' Company* had statutory authority to grant a new mark, and that right is preserved to them; but the Registrar has no such authority. The effect of the Act of 1875 is reviewed by Lord *Blackburn* in *Orr Ewing* v. *Registrar of Trade-marks* (5), nor is anything in the Act of 1883 at variance with this view: see sects. 62, 78, 90.

[*In re Riviere's Trade-mark* (6), *Ex parte Stephens* (7), and *In re Barrows' Trade-marks* (8), were referred to.]

1886. March 27. COTTON, L.J.:—

This is an appeal from the decision of Vice-Chancellor *Bacon*, who declined, on the opposition of the Appellants here, to prevent the registration of a trade-mark which the Respondents, the executors of *Hudson*, had applied to have registered.

The application was made just two days before the present Act came into operation, and I certainly had some doubts, notwithstanding the saving in the Act of 1883, whether the application

(1) 26 Ch. D. 288.
(2) 7 Ch. D. 834.
(3) 23 L. J. (Ch.) 255.
(4) 13 Beav. 209.
(5) 4 App. Cas. 479, 494–7.
(6) 26 Ch. D. 48.
(7) 3 Ch. D. 659.
(8) 5 Ch. D. 353.

ought to be dealt with under the Act of 1883 (the present Act) or the Act of 1875. Undoubtedly the application was made under the Act of 1875, and the better course, having regard to the saving in the later Act, which says that notwithstanding the repeal of the previous Act it should not affect any application made before that Act came into operation, would be to treat it as counsel on both sides have treated it, viz., as if the Act of 1875 applied and would regulate the matter. As regards the main question argued, there is practically no difference between the Act of 1875 and the Act of 1883. The main point that was argued, subject to what I shall have to say as to the particular thing proposed to be registered, was this. The mark proposed to be registered had never been used before the application, and accordingly the point, and it is a most important point, which we have to consider is this, whether the Act of 1875 enabled anything to be registered as a trade-mark which had not been already used, and there is a very considerable difficulty on that point, because the very essence of a trade-mark independently of the Act was user. The right could be gained, and only gained, by use in connection with articles sold by the person claiming to be entitled to the trade-mark in such a way as to distinguish those goods as his goods. That was the very essence of a trade-mark, and we find that there is a distinction in the Act of 1875 between those things which were used before the Acts as trade-marks and those which had not been so used. We find in sect. 10, which defines what is to be the trade-mark for the purposes of the Act, that any special or distinctive word or words, or combination of figures or letters used as a trade-mark before the passing of this Act may be registered as such under this Act. Of course if they had been used before the passing of the Act, there was the user which would establish them as trade-marks, and those were the only trade-marks that could be taken into account as being entitled to any protection until the Act was passed, and then we must see whether the Act makes any distinction.

Now, independently of these words which I have read, the Act says that for the purposes of this Act certain specified things shall be considered trade-marks. A trade-mark must consist of one or more of the following essential particulars, that is to say

C. A. 1886 *In re* HUDSON'S TRADE-MARKS. Cotton, L.J.

the name of an individual or firm printed, impressed, or woven in some particular and distinctive manner, a written signature, or copy of a signature, a distinctive device, mark, heading, label, or ticket. Then there might be added to any one or more of these any letters, words, or figures. Having regard to the distinction which appears here, that looks as if the Act intended to give to these particular things the position of a trade-mark, if and when they were registered; but unless they were of that distinctive character which is pointed out in the first part of sect. 10, these things could not be registered, and then the right would depend on user, which would really to the mind of a lawyer of not quite recent date be the only mode of acquiring title to a trade-mark. The Act is difficult, but we must see what it does provide, and omitting sect. 1, which is only a restriction on the right of suit unless there is registration, sect. 2 is as follows:—"A trade-mark must be registered as belonging to particular goods, or classes of goods; and when registered shall be assigned and transmitted only in connexion with the goodwill of the business concerned in such particular goods or classes of goods." Now that points to user, but we must recollect this, that it not only points to user, but it points to the mode in which title to a trade-mark can be transmitted, viz., only in connection with the goodwill of the business engaged in making the goods for which the trade-mark was registered. Then come these words, "but subject as aforesaid registration of a trade-mark shall be deemed to be equivalent to public use of such mark." When we come to a trade-mark which had been used before the passing of the Act the question I am now considering cannot arise; but this provision applies to future as well as existing trade-marks, and, as far as one can see, the intention of the Act was this, that, independently of those things, the title to which entirely arises from user antecedent to the Act, those particular things which sect. 10 says are to be trade-marks "for the purposes of this Act" may be registered even although there has been no user of them so as to give a right independently of the Act. But undoubtedly there is a difficulty, because when you come to register a trade-mark it is to be something which is to be considered as a trade-mark before you apply and before you register; and in my opinion the

meaning of the Act, although very obscure, is that those distinctive things which are comprised in the first part of sect. 10 shall be considered as trade-marks even before they are registered, yet not so as to give any one the right to complain of the user of them until they have been registered, the registration being equivalent to public use of such marks.

Of course I am only considering the question of what would be necessary before the application to register. When there is a registration of that which is a trade-mark questions will often arise as to the right to restrain by injunction any infringement of that trade-mark, and this Court has already decided (1), that where there has been no making of goods to which the trade-mark applies, or on which it has been used, there can be no deceit by putting that same mark on other goods.

I have stated my opinion on that important portion of the Act, but there are great difficulties, especially in sect. 5, which must be dealt with. That section deals with the questions, whether anything is on the register as a trade-mark which ought not to be on, and whether anything is not on the register when an application has been made to register it as a trade-mark and it ought to have been so registered. The Act of 1883 to a considerable extent avoids the difficulty which arises from the language of that 5th section, which is this, "If the name of any person who is not for the time being entitled to the exclusive use of a trade-mark in accordance with this Act, or otherwise in accordance with law, is entered on the register of trade-marks as a proprietor of such trade-mark, or if the Registrar refuses to enter on the register as proprietor of a trade-mark the name of any person who is for the time being entitled to the exclusive use of such trade-mark," then the register may be rectified. The difficulty is this: Is a man to be considered as entitled to the use of any trade-mark when he has never used it at all? That is a difficulty, but I think the meaning is this. If a man has designed and first printed or formed any of those particular and distinctive devices which are referred to in the first part of sect. 10, he is then looked upon as the proprietor of that which is under that Act a trade-mark, which will give him the right so

(1) *Edwards* v. *Dennis*, 30 Ch. D. 454.

C. A. 1886 *In re* HUDSON'S TRADE-MARKS. Cotton, L.J.

soon as he registers it. How can it be said he is entitled to the exclusive use of it? He never has used it; but in my opinion the language, though not appropriate, means this, that a man who designs one of those special things pointed out in sect. 10, is, as designer, to be considered as the proprietor of it, and if there is no one else who has used it, or who can be interfered with by the registration and subsequent assertion of title to the mark, then he is to be considered as entitled within the meaning of the Act to the exclusive use of that which in fact has never been in any way used, but which has only been designed by him, and which he can be treated as the person entitled to register, if no one else had so used it as that his user would be interfered with by the registration. One clause in this section provides for old trade-marks as I understand it, the words "in accordance with this Act," referring specially to the special devices provided for by sect. 10, and the words "or otherwise in accordance with law," referring to those acquired by user, and independently of and antecedent to the Act. There may be a trade-mark used the right to which is gained by the user, not registered, because although no one can bring any action in respect of his trade-mark until it is registered, yet he has a right to it, subject to that fetter imposed upon him by the Act, if he has used it before the Act of 1875.

That in my opinion is the true construction of this Act, notwithstanding the anomalies, and notwithstanding that, as I think, the legislature when they passed this Act had not clearly in mind what was the true essence of a trade-mark. They have used language derived from law, independently of this Act, as applied to things which never could become trade-marks before registration, except under the provisions of this Act, and in fact the forms which have been used under the Act, especially the form of application which was in use when this application was made, shew that that has been the course of action under this Act, because the applications and declarations made under the Act of 1875 require no statement of user except in cases where it is intended to register the trade-mark as a trade-mark, the right to which has been gained by user antecedently to, and independently of, the Act. That of course should not, if the Act were clear,

prevent our giving the true construction to the Act, yet I must say that I should have hesitated to put another construction upon it, having regard to the fact that for so many years the practice has been to register new trade-marks; trade-marks made so simply by the definition of sect. 10, without any reference to their user, and without making it a condition that they shall be shewn to have been used before registration.

But now we have to come to the more immediate question between these parties, and here no doubt it will be material to consider whether we can deal with this under the Act of 1883 or the Act of 1875.

What was the application? It was an application to register a label which was annexed to the application, and I have it before me. It is a label with a pattern round it, and then a certain amount of light, and then there is a dark patch in the centre on which the name of *Hudson* and the words "Carbolic Acid Soap Powder" are printed, and there are other words round the label. I do not think that the parties have been quite following the same line during the course of the contest, because the arguments in the Court below seem to have been entirely on the Act of 1883. But here the only objection to this label is this, that by using the words "Carbolic Acid Soap Powder" on the label which it is proposed to register, the applicant is seeking to secure to himself the exclusive right to use those words "Carbolic Acid Soap Powder."

Now ought this, independently of the objection which I shall have to deal with, to be registered? In my opinion it is a matter which could properly be registered under the Act of 1875. It is a label, and I think a "distinctive" label, with words added. It is distinctive in this way, that there are ornamental lines around it, and part of it is in one colour, white, and in the centre, as I have said, there is a black patch where the name of the owner *Hudson* could be put, and then the description of the goods to which it applied, and other words, and the Act specially says that to a distinctive label there may be added any words. In my opinion all that the person registering this can claim is the whole label as his trade-mark. He cannot say that a portion of it, as "Carbolic Acid Soap Powder," can be claimed by him as a registered trade-

C. A. 1886

*In re* HUDSON'S TRADE-MARKS.

Cotton, L.J.

mark. It is not. Had he applied to register "*Hudson's* Carbolic Acid Soap Powder" I see no ground on which he could have based such an application, unless those words had been used before the date of the application, because it is not the name of the firm woven in any particular or distinctive manner: but it is only the combination which is the label. It is his label which he must claim to register, and which in fact he does register. I entirely dissent from the view that he could have taken part of the words out of this combination, omitting the label altogether, and have said, "That is my registered trade-mark, and I insist upon that as protecting my goods." Of course I entirely omit the reference to the trade-mark which is already registered and stamped on part of this label, the arm and dolly, because that is a distinct registered trade-mark, but I am considering, wholly independently of that, what was impressed upon this label. If it had been under the Act of 1883, then, having regard to sect. 74 of that Act, the Court would have said that the applicant could not register this unless he disclaimed in his application all those words on the label which he proposed to, and is in my opinion entitled to, register, which are common to the trade, and any claim to the exclusive use of those words. Sect. 74, sub-sect. 2 requires that disclaimer to be in the application, but as the application was made before the Act, it cannot be that the application was bad because it contained no disclaimer of these words. It is remarkable, having regard to the contest between the parties in this case, that there are in the application itself these words, "The words 'Soap Powder' being words in common use in the soap trade were in use, but varied by other terms also common to the soap trade," and therefore as regards a large portion of that about which the contest arose, and was vigorously fought on both sides, there is a statement in the application that they are common words in respect of which, as being a trade-mark, no right could be claimed. I am putting aside the question how far the use of that which of itself is not a trade-mark, arranged in such a way as to imitate the real trade-mark, would or would not entitle the owner of the registered trade-mark to an injunction; but I am only pointing to this, that on the application there is the distinct disclaimer of any right to use by themselves as a trade-mark those

words "Soap Powder." What ought we to do? The Act of 1875 contains nothing like that which I have read from the Act of 1883. Reference was made to the latter part of sect. 6 of the Act of 1875, which I think does not apply to this case, and which says "It shall not be lawful to register as part of or in combination with a trade-mark any words the exclusive use of which would not by reason of their being calculated to deceive or otherwise be deemed entitled to protection in a Court of Equity; or any scandalous designs." In my opinion that does not give to the Court the same power as is given to the Court by sect. 74 of the Act of 1883. It points to there being something in the character of the words which are upon the label, viz., that they are deceitful in themselves, or scandalous, or something of that kind, so that under the old law no exclusive right to them could be gained. As the application was made under the old Act, what ought the Court to do? I regret that we have not got the power in this case, as the application was before the Act of 1883, of enforcing the disclaimer as a term of registration; but in my opinion the registration of this label as a trade-mark cannot give the applicant any right by any length of user to the exclusive use of those words "Carbolic Acid Soap Powder." Those are words merely descriptive of the article to which the label is to be affixed, and not words which can be considered as distinguishing the make of the particular person, and therefore, in my opinion, by using those words in the label, the applicant can no more gain any right to their exclusive use, so as to entitle him to complain of their use by others, than to the use of the words "Soap Powder," or the words "useful for washing dogs or other animals."

I am laying aside the fact that by a certain arrangement of common things one man may pass off his goods for those of another, and be liable to an injunction if he do so by imitating the registered trade-mark so as to deceive others; but, in my opinion, on the express ground that the registration of these words of mere description when used on the label, however long they may have been used on the label, cannot give the applicant any right to them as a trade-mark, I think we ought, with that expression of opinion, not to refuse to allow this label to be registered, though it has those words upon it.

C. A. 1886 *In re* HUDSON'S TRADE-MARKS. Cotton, L.J.

But then we come to the question of costs. As I understand, the Appellants have always been ready to withdraw their objection if in some effectual way a disclaimer of any right to the exclusive use of those words had been given. I hope now, that this expression of opinion by the Court of Appeal will prevent any claim to the exclusive right to the use of those words being made; but the applicant never did disclaim his intention to get an exclusive right to those words, and on looking at the cross-examination I see that several of the objectors' witnesses were cross-examined with regard to the question whether they had ever made any Carbolic Acid Soap. What was the use of that line of examination unless the applicant for registration intended to contend, as I understand he did in his evidence contend, that he was the first maker of Carbolic Acid Soap Powder, at the same time admitting that the words "Soap Powder" are words common to the trade, and unless he desired, by putting on his label and retaining there the words "Carbolic Acid Soap Powder," to get some right to the exclusive use of those words even though others made exactly the same thing? In my opinion, therefore, as the litigation has really been caused by a desire to get some exclusive right to those words, although we dismiss the appeal for the reasons I have stated, we think we ought not to give any costs.

BOWEN, L.J.:—

I have nothing to add. I entirely agree with the judgment which has been given.

FRY, L.J.:—

I entirely agree with the judgment which has been pronounced by Lord Justice *Cotton;* but, notwithstanding my assent, I think the case is of so much importance that it is proper to add a few words.

There are two questions which arise, one as to the construction of the Act of 1875, and whether what have been called "new trade-marks" can be registered or not; the other on the special circumstances of this case. The Act of 1875 certainly presents great and formidable difficulties in regard to its construction. I have

doubted, both in this case and other cases, as to what was its true construction, and I am not the only member of this Court who has expressed those doubts in previous cases.

When we look at the 1st section we find that the registration is to be of trade-marks and the proprietors of them, language which seems to assume that the pre-existing right of a proprietor to a trade-mark is the thing to be registered, and we find that the operative part of that clause only puts a fetter upon the right of suing by such proprietor of the trade-mark. Then there are other clauses which look in the same direction, and not least the 2nd sub-section of sect. 5, which provides for the determination of the rights by the Court of claimants to the trade-marks, language which again seems to assume that there is an existing right to the trade-mark. But, on the other hand, it is almost impossible to construe the Act, as it appears to me, without coming to the conclusion that the Legislature were minded, in a somewhat obscure manner, to effect a great and fundamental change in the law of the country. Before the passing of the Act the property in any trade-mark could be obtained only by user, or, in the case of cutlery goods, by an assignment by the *Cutlers' Company*; but it appears to me that under the Act, a mode of acquiring a right to a trade-mark is given mainly by registration. The traces of that are to be found especially, as it appears to me, in the two sections of the Act to which I will shortly refer—the 5th and the 10th. The 5th provides that, "If the name of any person who is not for the time being entitled to the exclusive use of a trade-mark in accordance with this Act, or otherwise in accordance with law, is entered on the register of trade-marks," then the register may be rectified. That appears to assert that there are or may be two titles to the exclusive use of a trade-mark, one in accordance with the Act and the other "otherwise in accordance with law." I think, therefore, that is an indication of the intention of the Act to give a new title to the exclusive use of a trade-mark. I am confirmed in that conclusion by the 10th section, which refers to user in cases of trade-marks used before the passing of that Act, but is silent with regard to the user of any other classes of trade-marks. Therefore, although not without hesitation and not without difficulty, I come to the conclusion

C. A. 1886 *In re* HUDSON'S TRADE-MARKS. Fry, L.J.

that the true meaning of the Act was to enable a person who had invented a trade-mark which had not been previously used by some other person to obtain registration of that trade-mark and to treat its being on the register as evidence of public user or equivalent to public user.

With regard to the second question, the special circumstances of this case, I entirely concur in the view that by the label in question the Respondents cannot acquire any exclusive right to the use of the words "Carbolic Acid Soap Powder," and I am bound to say that I do not think the application was a perfectly fair one, because the Respondents described the words "Soap Powder" as being in common use, but did not disclaim the words "Carbolic Acid Soap Powder." I therefore think the form of application, to say nothing of the argument used throughout the case, is one which justly awakened suspicion against the Applicants. For these reasons I concur in the view that although the Respondents succeed there should be no costs of this appeal.

Solicitors: *Bower, Cotton, & Bower*, agents for *Radford, Gill, & Radford, Manchester; Frith Needham*, agent for *Caddick, West Bromwich.*

M. W.

---

C. A. 1886 *March* 24, 31.

## LEWIS *v.* JAMES.

[1884 L. 196.]

*Purchaser in Possession—Mining Lease—Payment of Royalties into Court.*

The Plaintiffs commenced an action against the Defendant for specific performance of an agreement for a lease of a coal mine by the Plaintiffs to the Defendant at a royalty, as the Plaintiffs alleged, of 10*d.* per ton. The Defendant counter-claimed to have specific performance with a royalty of less amount. The Defendant was in possession and raising and selling large quantities of coal, but he alleged that he had expended on the mine more than the value of the coal raised. He also brought an action against the Plaintiffs in the Queen Bench Division to obtain damages for misrepresentations alleged to have been made to him for the purpose of inducing him to enter into the agreement, which action was still pending. The Plaintiffs moved for an interlocutory order that the Defendant might be ordered to pay into Court the amount of royalties at 10*d.* per ton on the coal he had raised. *Bacon*, V.C., refused the motion:—

*Held*, on appeal, that although it would not be right, while the rate of

royalty was in dispute, to order the Defendant to pay into Court the amount of royalties at the rate claimed by the Plaintiffs, he ought to be ordered to pay in the amount of royalties at the rate which he himself alleged to be the one agreed upon, and that as his carrying away coal diminished the value of the property he would not have the usual option of giving up possession instead of paying money into Court.

THE Plaintiffs were lessees of certain beds of coal, and on the 1st of May, 1878, an agreement by letters of that date was entered into that the Plaintiffs should grant an underlease at a royalty of 10*d.* per ton and a dead rent of £300 to the Defendant, who was the occupier of adjacent mines. The Defendant was let into possession, and, as he deposed, expended upwards of £14,000 in making an underground passage from his own mine to one of the seams agreed to be demised by the Plaintiffs. The Defendant commenced raising coal in 1881, and in the half-year ending December, 1881, more than 4000 tons were raised, in 1882 more than 20,000 tons, and the operations were continued on about the same scale up to the present time.

The parties being unable to agree as to the terms of the underlease, the Plaintiffs in January, 1884, commenced this action for specific performance.

The Defendant by his statement of defence alleged that the agreement had been that the Defendant should pay a royalty exceeding by 3*d.* per ton the royalty which the Plaintiffs were to pay to their landlord, and that the Plaintiffs represented that such royalty was 7*d.* per ton; that the Plaintiffs concealed from the Defendant the fact that, at the time when the agreement was entered into, the royalty of 10*d.* payable by the Plaintiffs under their lease had been reduced.

The Defendant by counter-claim relied on the above statements, and stated that he had expended £14,000 on the faith of the agreement, and claimed specific performance of the agreement in the letters of the 1st of May, 1878, subject to modification as to the amount of rent to 3*d.* per ton improved rent, or, in the alternative, damages.

An action by the Defendant against the Plaintiffs for damages for inducing him to enter into the agreement by misrepresentation was pending in the Queen's Bench Division in which the

C. A. 1886 LEWIS v. JAMES.

Defendant alleged that at the time when the agreement was entered into the Plaintiffs had no right or title to grant any lease to the Defendant, for that the Plaintiffs had obtained their lease upon terms which, as they well knew, their lessor, who was a tenant for life leasing under a power, had no authority to grant, and that the Plaintiffs fraudulently concealed the facts from the Defendant.

No payments having been made by the Defendant to the Plaintiffs, the Plaintiffs moved that the Defendant might be ordered to pay into Court the amount payable for dead rent and royalty according to the terms of the letters. The Plaintiffs calculated the amount at £5623 8*s.* 9*d.* Vice-Chancellor *Bacon* refused the application, and the Plaintiffs appealed.

Sir *H. James*, Q.C., *Marten*, Q.C., and *Phipson Beale*, for the Plaintiffs:—

This is the case of a purchaser in possession before completion. The Defendant is rapidly working the mines and selling the coal without paying anything. If he should become insolvent the Plaintiffs will have lost the coal and got nothing for it.

[COTTON, L.J.:—Would you be content with payment into Court of royalty at the rate admitted by the Defendant?]

Yes.

[They were then stopped by the Court.]

*Hemming*, Q.C., and *MacClymont*, *contrà*:—

The Plaintiffs have no power to grant us the lease which they have agreed to grant.

[BOWEN, L.J.:—That cannot be decided now, and you cannot be allowed to get the coal without any security that it will ever be paid for.]

Where a purchaser is let into possession before completion the vendor may call upon him to pay the purchase-money into Court or give up possession. If the Plaintiffs had given the Defendant that option he would have given up possession. It is not the course of the Court to make an order for payment into Court without giving an option.

[FRY, L.J., referred to *Cutler* v. *Simons* (1) and *Pope* v. *Great Eastern Railway Company* (2) as cases where no option had been given, the purchaser having done things to alter the state of the property.]

The Plaintiffs, we say, are unable to grant us a lease.

[BOWEN, L.J.:—Under what authority can you be getting the coal except the agreement which you yourselves set up for payment of the reduced royalty?]

Under an authority given by the Plaintiffs that we should enter for the benefit of both parties, and we did enter before we had discovered the fraud of the Plaintiffs, and their want of title to grant a lease. If we ceased working the mine would be drowned. The case is not like those referred to where the purchaser was committing acts in the nature of waste. The Defendant was put into possession in order that he might work the mines.

COTTON, L.J.:—

This is a motion of a somewhat special character made under very special circumstances. An action is brought for specific performance of a contract for a lease of a mine by the Plaintiffs to the Defendant. The Defendant delivered a counter-claim asking to have specific performance on a different footing, viz., to have a lease at a smaller amount of royalty than that which the Plaintiffs claim. In the meantime the Defendant is in possession and is working the mine. He alleges that he has expended upon the property more than the value of the coal raised, and that is probably true, for it does not require any evidence to shew that when a mine is first opened there must be a very considerable expenditure which for some time will exceed the amount received for the coal raised. This working has been going on for some time. Besides the action for specific performance by the lessor and the counter-claim by the lessee there is an action in the Queen's Bench Division by the lessee against the lessors for damages. Now come the Plaintiffs saying to the Defendant, "You are working our coal, and therefore you ought to pay into Court, until the questions between us are decided, the amount

(1) 2 Mer. 103. (2) Law Rep. 3 Eq. 171.

C.A. 1886 LEWIS v. JAMES. Cotton, L.J.

which according to the agreement you ought to pay for coal which has been raised." We think that this contention cannot succeed to its full extent, for as there is a contest what the terms of the agreement as regards the royalty are, it would not in our opinion be right to require the Defendant to pay into Court what the Plaintiffs allege to be the proper amount of royalty.

This is in some respects like a case where a purchaser being in possession is required to pay into Court, if he remain in possession, the purchase-money agreed upon, but it is well known that in such a case under ordinary circumstances an option is given to the purchaser to go out, and the order only is that if he continue in possession he must pay the price into Court. But that is not necessarily the only order which the Court can make in such a case. Special circumstances may vary it and there are two cases to which Lord Justice *Fry* referred: *Cutler* v. *Simons* (1) and *Pope* v. *Great Eastern Railway Company* (2) in which, where a purchaser in possession was doing acts which were diminishing the property or interfering with the value of the property, the Court ordered the money to be paid into Court without giving him an option of going out and leaving the property which he had interfered with. In *Pope* v. *Great Eastern Railway Company* a railway company was in possession and had turned out weekly tenants, and some of the property had been pulled down. Under those circumstances the Court decided that the company, having interfered with the property and rendered it less valuable than it was, so that the vendor would not have a sufficient security for the purchase-money, should at once pay the price into Court. In *Cutler* v. *Simons* and the other cases there mentioned, which were before Lord *Eldon* about the same time, orders were made for payment of the purchase-money into Court where purchasers in possession had committed acts of ownership tending to alter the nature of the property. The principle of those cases is this, that although under ordinary circumstances a purchaser in possession has the option of going out, and is not ordered to pay the purchase-money unless he elects to stay in, yet where he has done that which has interfered with the value of the property, the Court does not give him the option. Here the Defendant is

(1) 2 Mer. 103. (2) Law Rep. 3 Eq. 171.

in possession, and although he may have erected valuable machinery he is taking away part of the very subject matter of the contract, and he insists that he is in possession under an agreement of which he himself is asking for specific performance. He ought then, in my opinion, to pay into Court until the rights of the parties are decided that royalty which he says he will have to pay when the contention between the parties is decided.

[His Lordship then considered a question which had been raised as to postponing the application until the cross-examination of one of the Plaintiffs had been concluded, and gave his reasons for holding that there should be no postponement, but said that an opportunity ought to be given to the Defendant of questioning the amount, and that the appeal would stand over till the 31st, when the sum to be paid into Court would be determined.]

BOWEN, L.J.:—

I agree with what the Lord Justice has said. What justice requires is plain, and it seems to me we have the clearest power to do it.

I entirely agree with what the Lord Justice has said about the power of the Court to make this kind of order in an action for specific performance, and I will not go again through matters with which he is so much more conversant than I. Treat the action as you like, it is admitted that in any view of the case there is a liquidated sum due in respect of coal taken. It may be, for anything I know, that the Defendant may have a good cause of complaint against the Plaintiffs in respect of misrepresentation, or in respect of the damage and expenditure into which he has been led by the misconduct of the Plaintiffs, but that would be in the nature of a counter-claim for a sum to be set off against what stands as a liquidated sum due in respect of coal taken. I think that is clear. The Plaintiffs desire specific performance. They claim royalty at 10*d.* per ton for coal taken. The Defendant does not deny that he made an agreement which he intended to be binding, in which the royalty was (subject to what may be said as to figures) a smaller sum which I will call 9*d.* The Defendant indeed complains that there has been misrepre-

C. A. 1886 LEWIS v. JAMES. Bowen, L.J.

sentation on the part of the Plaintiffs, and that the Plaintiffs cannot give him what they promised to do, but what is the residuum of fact which is beyond all dispute? Why, that the Defendant is going on working this very coal and carrying it away. Now either he has a right to do it, or he has not a right to do it. If he has not a right to do it, he ought to account for the value of the coal, at all events to the extent of the royalty which he himself says he was to pay. If he has a right to do it, his only claim of a right to do it can be upon the footing of what he alleges to be the agreement, viz., that he should pay a royalty of 9*d*. In either view something ought to be paid for the coal, and that something is the sum fixed by the Defendant himself. What, then, is the power of the Court on facts which stand as I have described the facts here? The Plaintiffs at any moment, on motion for judgment, could get an order for payment of the minor royalty on the coal taken, and although it would not be reasonable to make the Defendant pay over that sum to the Plaintiffs, because he says that he has a counter-claim in the nature of a claim for misrepresentation and for moneys spent on the mine, yet to secure that sum in Court seems to me under the circumstances to be clearly within our jurisdiction. I think therefore from every point of view we have power to make this order. [His Lordship then stated his reasons for agreeing with Lord Justice *Cotton* that the making an order ought not to be postponed till the conclusion of the cross-examination.]

It seems to me that what the Lord Justice has said is right, that we ought to deal with this motion and deal with it peremptorily next Wednesday.

FRY, L.J.:—

My learned Brethren have so fully gone into this case, and have so fully expressed the views I entertain that I hope I shall not be thought wanting in respect for the Vice-Chancellor if I confine my judgment to expressing my entire assent with what has fallen from them.

---

March 31. The case was in the paper again, and an order was

made on the Defendant to pay into Court a specified sum between £3000 and £4000.

C. A. 1886 LEWIS v. JAMES.

Solicitors for Plaintiffs: *Bell, Brodrick & Gray*, agents for *Lewis & Jones, Merthyr Tydfil.*

Solicitors for Defendant: *Weall & Barker.*

H. C. J.

---

## *In re* COLLING, A PERSON OF UNSOUND MIND.

C. A. 1886 *March* 22; *April* 5.

*Trustee Act*, 1850 (13 & 14 *Vict. c.* 60), *ss.* 2, 29, 30 [*Revised Ed. Statutes, vol, x., pp.* 982, 989]—*Vendor and Purchaser.*

By an order under the *Lunacy Regulation Act*, 1862, the guardians of the poor of *N.* were authorized to sell a freehold belonging to *A. C.*, a person of unsound mind, and to receive the purchase-money and execute a conveyance. The property was sold in May, 1885, the sale to be completed in November. An abstract of title was delivered, and no objection was taken to the title. On the 28th of June *A. C.* died. The guardians now presented a petition asking that *A. C.* might be declared a trustee within the meaning of the *Trustee Act*, 1850, and that their clerk might be appointed a trustee of the property and the estate vested in him in trust to complete the sale:—

*Held*, that *A. C.* could not be held a trustee within the meaning of the *Trustee Act*, 1850, and that the order could not be made.

*In re Carpenter* (1) approved.

BY an order made on the 9th of March, 1885, in the matter of *Ann Colling*, a person of unsound mind not so found, and in the matter of the *Lunacy Regulation Act*, 1862, it was ordered that a small freehold property of *Ann Colling* should be sold by the guardians of the poor of *Northallerton*, and that they should be authorized to make such sale on her behalf and receive and give a discharge for the purchase-money, and to execute a conveyance to the purchasers on her behalf for all her estate and interest in the property, and that the guardians should be allowed to retain £68 5*s.* which they had expended on the maintenance of *Ann Colling*, and should lodge the balance in Court.

The guardians put up the property for sale by auction in two

(1) Kay, 418.

C. A. 1886 — *In re* COLLING, A PERSON OF UNSOUND MIND.

lots on the 28th of May, 1885. Lot 1 sold for £600. Lot 2 was shortly afterwards sold by private contract for £280. Deposits of £60 and £28 were paid by the purchasers. The time fixed by the conditions for completion was the 23rd of November, 1885. The property was subject to mortgages for £160 and £156. Abstracts of title were delivered and the title was not objected to.

On the 28th of June, 1885, *Ann Colling* died. It was believed that before she became of unsound mind she had made a will, but it had not been found. Her heir-at-law was known, but she had no personal representative.

The guardians now presented a petition asking that it might be declared that *Ann Colling* at her decease was a trustee within the meaning of the *Trustee Act*, 1850, that their clerk might be appointed a trustee of the property in her room, and that the property might be vested in him upon trust to complete the sale.

*G. Y. Robson*, for the petition:—

I submit that valid contracts for sale having been entered into and the title accepted, the owner of the land became a trustee within the meaning of the *Trustee Acts*. It is very important that we should obtain an order, as we do not know where the legal estate is, and so cannot give an effectual conveyance.

[COTTON, L.J.:—Supposing an ordinary vendor to be a trustee under similar circumstances, which I doubt, it does not follow that the lunatic was a trustee. The Court sold on her behalf, and she was not bound by any contract.]

In *In re Russell's Estate* (1), where a landowner died before the completion of a compulsory sale to a railway company, his heir-at-law was held a trustee. In *Lysaght* v. *Edwards* (2), where a vendor died before completion but after the title had been accepted, the estate was held to pass under a devise of trust estates in his will, on the ground that a valid contract for sale makes the vendor a trustee for the purchaser.

[*In re Pilling's Trusts* (3) was also referred to.]

(1) 35 L. J. (Ch.) 461. (2) 2 Ch. D. 499.
(3) 26 Ch. D. 432.

COTTON, L.J.:—

C. A.
1886
*In re* COLLING, A PERSON OF UNSOUND MIND.

The case involves two points, whether the lunatic was a trustee within the Acts, and if so, whether we ought to transfer the legal estate where the trust is only constructive and the purchase-money has not been paid. We will consider the case.

1886. April 5. COTTON, L.J.:—

This is a peculiar case, and one of some difficulty. If we could make the order asked for we should be very glad to do so, as it would relieve the parties from considerable embarrassment. The application is one under the *Trustee Acts* asking for a vesting order as to land, on the footing that *Ann Colling* at her death was a trustee of it. An order for sale of the land had been made in lunacy, a contract for sale was entered into and a deposit paid; but before the residue of the purchase-money had been paid the lunatic died. We were pressed by Mr. *Robson* with a decision of the late Master of the Rolls in *Lysaght* v. *Edwards* (1), where, after a contract for sale had been entered into, the estate was held to pass under a devise of trust estates, but the question in that case was quite different from that in the present. Where a contract for sale has not been completed in the lifetime of the vendor, can he at his death be considered a trustee? To hold that he can would be a dangerous departure from the rules on which the Court has been in the habit of acting. The case which furnishes the best guide to a decision is *In re Carpenter* (2), where Lord *Hatherley*, when Vice-Chancellor, refused to make an order under circumstances very similar to those of the present case, and said that he could not do it unless the right to specific performance had been settled by a decree. It is difficult on an application of this kind to enter satisfactorily into the question whether the circumstances are such that specific performance would have been enforced. His Lordship, after referring to sect. 29 of the *Trustee Act*, 1850, and to sect. 1 of the amending Act as shewing that in cases of real estate the constructive trust must first have been declared by a decree of the Court, said "that the reason of that

(1) 2 Ch. D. 499. (2) Kay, 418, 420.

C. A.
1886
*In re* COLLING, A PERSON OF UNSOUND MIND.
Cotton, L.J.

was, that there might always be a question whether the contract could be enforced by a suit for specific performance; and it would be extremely inconvenient to declare the vendor to be a trustee upon a petition on which that point could not be decided." I think that is the correct principle. We were referred to a case before Lord *Romilly*, where he made a vesting order, guided, I think, by the special circumstance that the purchaser in that case had the power of taking the land compulsorily. I do not think that correct in principle. In *In re Cuming* (1) Lord Justice *Giffard* held, and we have since followed that decision, that if the purchase-money is paid to the vendor in his lifetime he becomes a trustee of the legal estate. Here the purchase-money has not been paid. The rule laid down by Lord *Hatherley* appears to me the correct one, and, though I regret it, I think we have no power to deal with this case under the *Trustee Acts*.

FRY, L.J.:—

I am of the same opinion. I think that Lord *Hatherley* laid down the correct principle. In sect. 29 the obtaining a decree for sale for the payment of debts of a deceased person is treated as a condition precedent. So in sect. 30 a decree for specific performance or conveyance is made a condition precedent. The 1st section of the Act of 1852 provides for the case where an order has been made for the sale of any lands for any purpose whatever. The Legislature appears to me to have meant that, in cases of contract, the Act in general should only apply in favour of a purchaser where there has been a decree or order on which his right is founded, and without saying that in no case where there is no decree or order can a vendor be held a trustee, I think that we cannot in the present case treat *Ann Colling* as having become a trustee of the property.

Solicitors: *Williamson, Hill, & Co.*

(1) Law Rep. 5 Ch. 72.

H. C. J.

## *In re* WHITLEY PARTNERS, LIMITED.

C. A. 1886 April 12.

*Signature to Memorandum of Association—Signature by Agent—Authority of Agent to sign—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 6, 11 [*Revised Ed. Statutes, vol. xiv., pp.* 203, 204].

*C.* verbally authorized *O.* to sign on his behalf the memorandum of association of a company. *O.* accordingly signed the name of *C.* to the memorandum without his own name appearing. The company being in course of winding-up *C.* was put on the list, and applied to have his name removed, on the ground that he had never signed the memorandum nor agreed to take shares:—

*Held*, that there being nothing in the *Companies Act*, 1862, to shew that the Legislature intended anything special as to the mode of signature of the memorandum, the ordinary rule applied that signature by an agent is sufficient:

*Held*, also, that although by sect. 11 of the Act a subscriber is bound in the same way as if he had signed and sealed the memorandum, still the memorandum is not a deed, and it is not necessary that the authority to sign it should be given by deed:

*Held*, also, that though it was irregular for *O.* to sign *C.*'s name without denoting that it was signed by *O.* as his attorney, the signature was not on that ground invalid:

*Held*, therefore (affirming the decision of *Bacon*, V.C.), that *C.* was not entitled to have his name removed from the list.

THIS company was registered on the 10th of November, 1873, as a company limited by shares. The memorandum of association purported to be signed by eight persons, the name of Mr. *Callan* appearing last, as a subscriber for 100 shares; and the articles of association purported to be signed by him in respect of the same number of shares. The company was unsuccessful and was ordered to be wound up. Mr. *Callan* was put on the list of contributories for 100 shares, and about the end of May, 1880, received notice of a call. He placed the matter in the hands of his then solicitor, and, as he deposed, heard no more about it till December, 1882, when he was served with orders for payment of calls. He disputed his liability, alleging that he had never agreed to take shares in the company nor signed the memorandum or articles.

On investigation it appeared that the signature of Mr. *Callan*

C. A. 1886 — *In re* WHITLEY PARTNERS, LIMITED.

to the memorandum and articles was not in his own handwriting, but had been written by a Mr. *Oakley*, who had simply signed Mr. *Callan's* name without anything to indicate that the signature was not written by Mr. *Callan*, but by some other person as his attorney or agent. Mr. *Oakley* deposed that in October, 1873, he received from Mr. *Callan* authority, verbally and by telegram, to sign Mr. *Callan's* name to the memorandum and articles, but it was not alleged that any authority was given by deed, nor was any written authority produced, and Mr. *Callan* denied having given any authority at all. Vice-Chancellor *Bacon* having refused to remove the name of Mr. *Callan* from the list of contributories, Mr. *Callan* appealed.

*Theodore Ribton*, for the Appellant:—

On the evidence I contend that *Callan* is not shewn to have given *Oakley* any authority to sign for him; and if he cannot be fixed as having signed the memorandum, there is no evidence that he ever agreed to take shares. But suppose he did give *Oakley* authority to sign for him, I contend that a signature by an agent will not do. The *Companies Act*, 1862, says nothing about signature by an agent, and the signature required by sects. 6 and 11 must be personal signature: *Hyde* v. *Johnson* (1). The *Conveyancing and Law of Property Act*, 1881, s. 46, allows the donee of a power of attorney to execute in his own name. If, then, the signature of a memorandum by attorney is allowed, each attorney might sign in his own name, and a company would be formed, the members of which could not be traced.

[COTTON, L.J.:—The clause cannot be read as meaning that an attorney may execute in his own name without anything to shew that he executes as attorney.]

The memorandum of association is made equivalent to a deed by sect. 11, and if it can be executed by an attorney at all the authority should be given by deed. A signature by *Oakley* in the name of *Callan*, without any statement that the signature is by attorney, cannot be good.

[THE COURT asked for authority for that proposition.]

(1) 2 Bing. N. C. 776.

*Marten*, Q.C., and *Oswald*, *contrà*, were not called upon.

C. A.
1886
*In re* WHITLEY PARTNERS, LIMITED.

COTTON, L.J.:—

This is an appeal from a decision of Vice-Chancellor *Bacon*, who has refused to remove the name of the Appellant, Mr. *Callan*, from the list of contributories. It is conceded that his signature to the memorandum and articles was not written by himself, but the liquidator contends that it was written by his authority. The Appellant says that this is not enough, even if there was authority, which he denies. The case turns upon these questions, there being no other evidence that Mr. *Callan* ever agreed to take shares. Now there is nothing in the *Companies Acts* expressly requiring that the memorandum and articles must be signed by the subscribers with their own hands, but it is contended by the Appellant that the Act according to its true construction requires personal signature. Sect. 6 of the *Companies Act*, 1862, provides that "any seven or more persons associated for any lawful purpose may by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of this Act in respect of registration form an incorporated company," and by sect. 11 it is provided that the memorandum of association "shall be signed by each subscriber in the presence of, and attested by, one witness at the least." The Appellant contends that as nothing is said in the statute about signature by an agent, these expressions must mean that the signature is to be affixed by the subscriber himself. In support of this, *Hyde* v. *Johnson* (1) is referred to. That case I think was decided on the special ground that the enactment which the Court was then considering was one of a series of enactments which made a distinction between a man's signing by himself and signing by an agent, and it was therefore considered that where signature by an agent was not mentioned the Act required signature by the man himself. That may be quite right, but in the present case the enactment we have to construe is not one of a series of enactments some of which refer to signature by an agent, and I think it would be wrong to hold that an enactment simply referring to signature is not

(1) 2 Bing. N. C. 776.

C. A. 1886 *In re* WHITLEY PARTNERS, LIMITED. Cotton, L.J.

satisfied by signature by means of an agent. Suppose seven persons sitting round a table with a view to signing a document, and one of them says to another, "sign it for me," are we to say that the signature affixed under this authority is insufficient? I am of opinion that it is quite effectual. The signature in the present case is irregular, for it ought to have been "*P. Callan* by *Oakley* his attorney;" but this irregularity will not make the signature invalid if there was authority to affix it.

It was urged that assuming authority to have been given it was not duly given, for that as the memorandum of association is equivalent to a deed, the authority to sign it ought to have been given by deed. That is a fallacy. The memorandum has for certain purposes the effect of a deed. But it is not a deed. An authority to sign and seal an instrument must be given by deed, but though signature of the memorandum is made by the Act equivalent to signing and sealing, the memorandum is not signed and sealed. The authority to sign it therefore need not be given by deed.

[His Lordship then entered into a consideration of the evidence on the question whether Mr. *Callan* had given authority to sign the memorandum, and stated his conclusion to be that such authority had been given, and that the memory of Mr. *Callan*, who had been much engrossed by political matters at the time, was defective on this subject.]

BOWEN, L.J.:—

I am of the same opinion. [His Lordship then stated his reasons for agreeing with the conclusion of Lord Justice *Cotton* as to the question of fact.]

As regards the question of law, it is contended by the Appellant that it is not sufficient for a man to sign the memorandum of association by an agent, but that he must sign it himself. In every case where an Act requires a signature it is a pure question of construction on the terms of the particular Act whether its words are satisfied by signature by an agent. In some cases on some Acts the Courts have come to the conclusion that personal signature was required. In other cases on other Acts they have held that signature by an agent was sufficient. The law on the subject is thus summed up by *Blackburn*, J., in *Reg.* v. *Justices of*

*Kent* (1): "No doubt at common law, where a person authorizes another to sign for him, the signature of the person so signing is the signature of the person authorizing it; nevertheless there may be cases in which a statute may require personal signature." *Quain*, J., then says, "We ought not to restrict the common law rule, *qui facit per alium facit per se*, unless the statute makes a personal signature indispensable." *Archibald*, J., says, "I think this case comes within the common law rule, *qui facit per alium facit per se*, and there is nothing in the statute to qualify the operation of that maxim. It is easy to understand that there may be cases in which a different construction must be put on particular statutes." *Hyde* v. *Johnson* (2) was decided on the ground that *Lord Tenterden's Act* was to be read along with the *Statute of Frauds*, which expressly refers to signature by an agent, and that a clause which contained no reference to an agent was therefore to be held to require personal signature. In the present statute there is nothing in the way in which the memorandum of association is dealt with to shew that the Legislature intended anything special as to the mode of signature. The principle of *Hyde* v. *Johnson* therefore cannot be invoked in this case, and the general rule that a man may sign by an agent is not interfered with. I agree with Lord Justice *Cotton* that there is no ground for requiring the authority to sign the memorandum of association to be given by deed.

FRY, L.J.:—

I cannot usefully do more than express my entire concurrence in the judgments of the Lords Justices.

Solicitors for appellant: *Bordman & Co.*
Solicitors for respondent: *Torr & Co.*

(1) Law Rep. 8 Q. B. 305, 307. (2) 2 Bing. N. C. 776.

H. C. J.

C. A.
1886
April 13.

## *In re* STRONG.

*Order for Payment against Solicitor as Solicitor—Default in Payment subsequent to Order striking off Roll—Order for Attachment—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 4, *sub-ss.* 3, 4 [*Revised Ed. Statutes, vol. xvi., p.* 112].

Where a solicitor makes default in payment of a sum of money which he has been ordered to pay in the character of an officer of the Court, he is not the less liable to an order for an attachment because in the interval between the date of the order and the time fixed for payment he has been struck off the roll, and has ceased to be a solicitor.

Of the three possible periods for ascertaining whether the person ordered to pay and making default held the character of a solicitor, and was as such within the exception of sect. 4, sub-sect. 4, of the *Debtors Act*, 1869, viz.—(1) of the act done; (2) of the order made; or (3) of the default committed, that to be looked to is, if not the first, at the latest the second period.

In cases of trustee and person acting in a fiduciary capacity (sub-sect. 3) (and per *Fry*, L.J., in that of a solicitor also) the period to be looked to is that of the act done.

By an order dated the 7th of December, 1885, upon an application before *Kay*, J., made on behalf of the Misses *Vaux*, it was ordered that *Robert Dundas Strong*, who had been found by the Court guilty of misconduct in his professional character of a solicitor, be struck off the roll of solicitors; and it was ordered that an account be taken of all moneys received by *R. D. Strong* from or on behalf of his clients, the said Misses *Vaux*, respectively, or from any other person or persons on their behalf respectively, other than a sum of £670 and interest thereon, for which a judgment had been recovered, and for interest at the rate agreed on, or where no amount of interest was agreed on, interest at the rate of £4 per cent. per annum. And it was ordered that *R. D. Strong* do within one month from the date of the Chief Clerk's certificate pay to the said Misses *Vaux* the amount which should be certified to be due to them.

The Chief Clerk by his certificate dated the 3rd of March, 1886, certified that there was a balance of £192 10*s.* due from *R. D Strong* to his said clients under an agreement by which he was bound to pay 10 per cent.

*Strong* having made default in payment, a motion was made by the Misses *Vaux* for leave to issue an attachment, and on the 8th of April, 1886, an order was made giving leave; but directions were given that the writ or writs of attachment were to lie in the office pending an appeal by *R. D. Strong* against the orders of the 7th of December, 1885, and the 8th of April, 1886.

Both appeals came on together. The Court, upon the appeal against the former order came, upon the evidence, to the same conclusion as *Kay*, J., with regard to the misconduct of *Strong*, and affirmed the order striking him off the roll.

The second appeal against the order of the 8th of April, 1886, was then argued.

*Sidney Woolf*, for the Appellant:—

This order was improperly made, for the case does not fall within the exceptions to sect. 4 of the *Debtors Act*. In the first place the order for payment was not made upon *Strong* in his character of solicitor. The only money the Chief Clerk has found to be due from him was money under the agreement. Every order made upon a solicitor is not necessarily to be assumed as made against him in his character of solicitor: *In re Freston* (1); *In re Dudley* (2).

Then, secondly, if the money was due from him as solicitor, the default in payment was not default in payment by a solicitor within the 4th section; for by the order of December, 1885, he had been struck off the roll, and was not a solicitor, and the Court has no jurisdiction over him.

[BOWEN, L.J.:—If a defaulting trustee is removed, does he not still fall within sub-s. 3 of that section?]

*L. Field*, for the Misses *Vaux*, was called upon only on the second point:—

The order was made when he was a solicitor, and the default in obeying that order must date back to the time when it was made. It can never have been the intention of the Legislature that, because the machinery of the Court for finding out the sum due from a solicitor may necessitate some delay, he should be able to

(1) 11 Q. B. D. 545. (2) 12 Q. B. D. 44.

C. A. 1886 *In re* STRONG.

avoid the consequences of disobedience of the order because he has been guilty of additional misconduct which has justified the Court in striking him off the roll. This is a default by a solicitor in obeying an order to pay money which he was ordered to pay as a solicitor.

*Woolf*, in reply.

COTTON, L.J.:—

This is an appeal against the order of Mr. Justice *Kay*, allowing the Misses *Vaux* to issue an attachment against Mr. *Strong*. An order was made against him while he was a solicitor, directing him to pay what on the Chief Clerk's certificate should be found due from him. It is said that, notwithstanding his non-compliance with that order, he is not to be sent to prison, because his case does not fall within the exceptions contained in sect. 4. of the *Debtors Act*, 1869. Reliance has been placed upon the alternative clause in sub-s. 4 of that section. "Default" (by an attorney or solicitor) "in payment of a sum of money when ordered to pay the same in his character of an officer of the Court making the order." Two objections have been taken: First, It is said that this order was not made against him "in his character of an officer of the Court," because the sum found by the Chief Clerk to be due from him was found to be so due under an agreement under which he has to pay interest at 10 per cent. But in my opinion that objection is wrong. The only jurisdiction which the Court had to make this order against him was the jurisdiction it possessed over him as its officer; and although the amount which he was ordered to pay might depend upon the agreement, yet the order directing payment was made against him in his character of solicitor, which was the only thing that gave the Court jurisdiction. The second objection is that the default was default in payment within a month after the certificate, and that as at that time he had ceased to be a solicitor, that default is not the default pointed out in the sub-section. Sub-sect. 3 has been referred to. Now it cannot be contended that, if an order has been made upon a trustee to pay a sum of money, he does not come within the exception, or that he escapes liability because, before the time

when default is made, he has been removed from his office. Two periods may be taken for ascertaining whether the man ordered to pay held the character of trustee, namely, either when the order for payment was made, and when the act which justified the order was committed. Under this sub-sect. 3 I am clearly of opinion that the period to be looked at is that when the act was done.

As regards sub-sect. 4, it is not necessary to decide whether the same period is to be looked at: it is sufficient to shew that when the act was done in respect of which the order was made, the person was a solicitor; because the whole jurisdiction of the Court to make the order depends upon the fact whether he was or not a solicitor, and the order must have been made against him in that character only. Of course the mere fact that he was a solicitor when the order was made would not be sufficient to bring the case within the exception. But it is quite sufficient as an answer to the second objection to shew that at the time when the order for payment was made the person against whom it was made was a solicitor, and that the order made at that period was made against him in his character of solicitor.

That is the case here, and therefore the appeal fails.

BOWEN, L.J.:—

I am of the same opinion. Mr. *Woolf* has contended that this sum of money was not ordered to be paid by the Appellant "in his character of officer of the Court making the order." Of course it is clear, as has been laid down in *In re Dudley* (1), that the mere fact that an order for payment is made against a man who happens to be a solicitor does not necessarily shew that that order was made against him in his character of solicitor. A solicitor may very well be ordered to pay a sum of money without being ordered to pay it as solicitor. But in this case we can hardly escape from the conclusion that the order made in this form to pay this money was an order made against him as a solicitor and as an officer of the Court, because there was no jurisdiction which the Court could exercise when it made the order except that which it possessed over him as one of its officers.

Then, secondly, if it is a default in payment of a sum of

(1) 12 Q. B. D. 44.

C. A.
1886
*In re* STRONG.
Bowen, L.J.

money which the Appellant has been ordered to pay as an officer of the Court, is the default a default in payment as an attorney or solicitor within the meaning of the sub-section? When he was ordered to pay the money he was a solicitor; when the default was made he was not, because he had been struck off the roll. Is that a default in payment by a solicitor? Perhaps in the strictest grammatical reading of the words it might not be, but is that, can that be, the true construction? We must look at the object of the Act. It was for the abolition of imprisonment for debt, except in certain cases, and in sect. 4 are comprised as exceptions from the operation of the statute six classes of default. With regard to certain of these defaults, it appears clearly to have been the intention of the Legislature to except from the abolition of imprisonment cases of non-payment of money where the obligation to pay was not an ordinary obligation to discharge a debt contracted, but was accompanied by or arose from the existence of an order (to take the instances in sub-sects. 3 and 4) of a competent tribunal. Coming to sub-sect. 4, can we see that the Legislature reasonably intended to make any distinction between the case of a solicitor who has misconducted himself in making default in payment of money which he had been ordered to pay and at the time of making default is still a solicitor, and that of a solicitor who has made default in payment of the same sum of money, but who in the interval between the order directing payment and the time when the default happened has been struck off the roll? It is impossible that the Legislature could have intended to make any such distinction. The legal obligation to obey the order in the latter case is the same, and unquestionably the moral obligation is the same. Can he escape from the necessity of fulfilling that obligation by shedding his professional coat? Without now deciding as between the date of the act done and the date of the making the order, I say that at all events the time to fix the character of the person by whom default is made is the moment at which the order was made, and if any order is made upon an officer of the Court to pay in the character of an officer of the Court he does not escape the alternative of having to pay or go to prison, because after the order is made he ceases to be a solicitor.

FRY, L.J. :—

Mr. *Woolf* has urged upon us that the Appellant's case does not fall within sub-sect. 4 for two reasons. First, it is said that the sum of money ordered to be paid by the Appellant was not ordered to be paid by him in his character of an officer of the Court making the order. But it is plain that in no other character could the order have been made upon him. The Court had no jurisdiction to make a summary order for payment against him except under its jurisdiction over him in his character of officer of the Court, and it is plain that the order was made under that jurisdiction.

Then, secondly, it is said that the default was not a default by a solicitor because *Strong* had been removed from the roll. It is to be observed that sub-sects. 3 and 4 provide for three cases of default—(1) default by a trustee, (2) default by a person acting in a fiduciary capacity, and (3) by a solicitor. It is not necessary to say that in all these cases the period at which the character is to be ascertained is the same; but as regards all the inquiry is the same, viz., at what time is the character to be ascertained—the character of trustee—of person in a fiduciary position—of solicitor. There are three possible times at which it can be ascertained; the time of the act done, of the order made, of the default committed. Bearing in mind the general scope of the exceptions, they seem to me to imply that the time for ascertaining the character in each case is the time when the act is done. But if not, that the time when the order is made is the latest moment. It would be putting a false and unreasonable construction on the Act if we were to hold that the time for ascertaining the character was that of the default committed.

The appeal must be dismissed.

Solicitor for Appellant: *Castle.*
Solicitor for Respondents: *J. W. Sykes.*

M. W.

C. A.
1886
KAY, J.
*March* 25.
C. A.
*May* 4.

## *In re* ANGLO-AFRICAN STEAMSHIP COMPANY.

*Company—Winding-up—Service out of Jurisdiction—Jurisdiction—25 & 26 Vict. c.* 89, *s.* 170 [*Revised Ed. Statutes, vol. xiv., p.* 239.]

The Court has no jurisdiction to give leave to serve notices of orders and other proceedings in the winding-up of a company on persons residing out of the jurisdiction.

THE *Anglo-African Steamship Company* (*Limited*) was wound up by an order of the Court, and an order was made for a call of £5 10*s.* a share against the contributories. The official liquidator now moved *ex parte* for leave to serve the order for calls, together with all summonses, orders, notices, and proceedings in the matter requiring service, upon certain contributories residing at *Lagos* on the coast of *Africa*, out of the jurisdiction of the Court, by sending the same through the *General Post Office*.

The application was heard before Mr. Justice *Kay* on the 25th of March, 1886.

*Hurrell*, in support of the application.

KAY, J.:—

I cannot make the order asked for. As I understand the matter, there is no section at all in the *Companies Acts* in reference to the winding-up of companies which authorizes service of either notices or balance orders, which are equivalent to judgments, upon persons residing out of the jurisdiction. In the *Joint Stock Companies Winding-up Act*, 1848 (11 & 12 Vict. c. 45), there was a provision (sect. 108) that every summons, notice, &c., might be served upon any party by being sent by the post, "although any such party may be out of the jurisdiction of the Court." The *Companies Act*, 1862, has omitted that provision—in fact, repeals the provision in the Act of 1848. It seems, therefore, that the Legislature designedly omitted the provision that service by the post should be effectual in the case of persons residing out of the jurisdiction of the Court, and that being so I do not see that I can accede to the application now made, but

I will allow the costs of it to be paid out of the assets of the company.

T. F. M.

The application was renewed by the official liquidator before the Court of Appeal on the 4th of May, 1886.

*Rose-Innes*, for the Applicant:—

By the *Joint Stock Companies Act*, 1848 (11 & 12 Vict. c. 45, s. 108), power was given to serve notices in the winding-up by post out of the jurisdiction of the Court. There was no corresponding provision in the *Companies Act*, 1862 (25 & 26 Vict. c. 89), but by the 170th section of the Act it was enacted that in cases not provided for by the rules to be made under the Act the general practice of the Court of Chancery, including the practice in winding-up companies, should be retained. The 63rd rule of the General Orders, November, 1862, made under that Act permitted service to be made on contributories by post. It appears, therefore, that the practice of serving contributories out of the jurisdiction by post has been reserved by the *Companies Act*, 1862. In *In re Busfield* (1) the Court of Appeal gave no opinion on this point; but in *Re General International Agency Company* (2) the Lords Justices granted leave to the liquidator to serve notices of an intended call on contributories residing abroad. Leave has been given to serve officials of a company resident in *Scotland* with a summons under a winding-up: *In re British Imperial Corporation* (3). The permission, if given, would not prejudice the contributory, for it might be given with a special reservation of the right of the person served to object to the validity of the service, if the call were enforced: *In re Land Credit Company of Ireland* (4).

COTTON, L.J.:—

This is an appeal from an order of Mr. Justice *Kay* refusing an *ex parte* application that the official liquidator of the *Anglo-*

(1) 32 Ch. D. 123.
(2) 16 L. T. (N.S.) 725.
(3) 5 Ch. D. 749.
(4) 39 L. J. (Ch.) 389.

C. A. 1886 *In re* ANGLO-AFRICAN STEAMSHIP COMPANY. Cotton, L.J.

*African Steamship Company* might be at liberty to serve out of the jurisdiction notice of a certain order and all other proceedings in the winding-up. The real object of the application was to serve an order for a call already made. In my opinion that refusal was right. The application is attempted to be justified by the words of the 170th section of the *Companies Act*, 1862, which in cases not provided for by the rules to be made under the Act, reserves the general practice of the Court of Chancery, including the practice in use in winding up companies. But in my opinion this is not a question of practice but of jurisdiction—whether this Court has the power to serve notices of an order on persons resident abroad, so that the order may be enforced against them when they come to this country. It is said that the leave may be given saving all rights of the persons served. But if what is done is wrong, in my opinion the Court ought not to do it, leaving the person served to take an objection which the Court ought itself to have taken. The case of *Re General International Agency Company* (1) was referred to, and it is said that there the Court gave leave to serve something—but what? It was only a notice that an application was going to be made for an order for a call. It only amounted to a notice that unless cause was shewn to the contrary an order would be made for a call. The Lord Justices, according to the report, said that the making of the call could be only the foundation of proceedings in the Courts of law abroad to compel payment of the call when made, and in those proceedings the question might be raised whether the service so effected was good or not; but if it was, they were of opinion that service by post would be sufficient. That is very different from the present case. We considered this subject at some length in *In re Busfield* (2), and it is unnecessary to deal with it again. I will merely say that service out of the jurisdiction is not a power inherent in the Court, but is only given by statute so as to be binding on British subjects, and not on others. There is no proof that the persons to be served are British subjects. But if they are, I am of opinion that the Court has no jurisdiction to make the order asked for, and that the appeal must be dismissed with costs.

(1) 16 L. T. (N.S.) 725. (2) 32 Ch. D. 123.

LINDLEY, L.J. :—

I am of the same opinion. The question whether service can be made out of the jurisdiction must depend upon a statute, or rules having the force of a statute. The present case must therefore turn upon the General Orders of 1883, or some statute now in force. The Appellant relied upon the *Joint Stock Companies Act*, 1848, and contended that under the 108th section of that Act the Court was enabled to serve persons out of the jurisdiction by post, and that this power had been reserved by the 170th section of the *Companies Act*, 1862. I doubt whether the major premiss is sound: for the effect of the Act of 1848 is not to give power to serve notices out of the jurisdiction, but to provide that in cases where such service was right it might be made by post. It only reformed the method of effecting service: but the question in this case relates not to the method but to the right of service. I cannot find such right given either by the Act of 1848 or the Act of 1862. Certainly it is not given by any of the rules of 1883. I say nothing about the rules of 1875, under which *Re General International Agency Company* (1) was decided: those rules in some respects went too far. But the rules of 1883 are more restricted. Therefore in my opinion the appeal must be dismissed.

LOPES, L.J. :—

This is an application by the official liquidator to serve notices of the proceedings in the winding-up on certain persons out of the jurisdiction, and the Appellant grounds his case upon the 170th section of the *Companies Act*, 1862. In my opinion what we are asked to do in this case depends not on practice, but jurisdiction, and is not covered by that section. The Judge was right, and the appeal must be dismissed.

Solicitors: *Rose-Innes, Son, & Crick.*

(1) 16 L. T. (N.S.) 725.

M. W.

V.-C. B.
1886
April 15.

## SWABEY *v.* DOVEY.

[1885 S. 4390.]

*Practice—Interrogatories, Summons for Leave to deliver—Striking out—Irrelevancy—Chief Clerk—Jurisdiction—Rules of the Supreme Court*, 1883, *Order* XXXI., *rr.* 1, 3, 6, 7.

On the hearing of a summons before the Chief Clerk for leave to deliver interrogatories under Rules of the Supreme Court, 1883, Order XXXI., r. 1, he may consider the general relevancy or irrelevancy of the proposed interrogatories, and may, if a copy of the interrogatories is produced to him on the summons, strike out such as are irrelevant: but he is not at liberty to settle or amend, in the way of condensation, the form of any particular interrogatory that is in itself relevant.

### Adjourned summons.

The action was for the specific performance of an alleged agreement to take a lease.

The statement of claim alleged that, under the will of *Maurice C. M. Swabey*, deceased, a freehold house, No. 56, *Union Street, Lambeth*, was vested in the Plaintiffs as his devisees in trust, his widow, the Plaintiff, *Mary Katherine Swabey*, being tenant for life: that on the 12th of January, 1884, the Plaintiffs, by their agent, agreed to let to the Defendants, and the Defendants agreed to take, the house on a repairing lease for twenty-one years from Michaelmas, 1881, at the yearly rent of £45, the Defendant to pay all the rates and taxes, except property-tax, to insure at the full value, and to complete the repairs to the satisfaction of the Plaintiffs' surveyor on or before the 24th of June, 1884: that the said agreement was evidenced by a memorandum in writing of the 12th of January, 1884, and signed by *George Barton*, as the agent of the Defendants: that thereupon the key of the house was handed, on behalf of the Plaintiffs, to *Barton*, as agent of the Defendants, and that the Defendants thereupon, pursuant to and in part performance of the agreement, entered into and had ever since remained in possession of the house: that the Plaintiffs had long since caused the draft of the proposed lease to be sent to the Defendants for their approval, the Plaintiff, *Mary Katherine*

*Swabey*, being named as lessor; that the Defendants, had never returned the draft, and refused to do anything in the matter: that the Defendants had refused to pay any rent: and that a sum of £75 was due from them for rent. The Plaintiffs claimed specific performance of the agreement, payment of the £75, and costs.

In their statement of defence the Defendants did not admit the Plaintiffs' title or the agreement: they alleged that the *Statute of Frauds* had not been complied with, and did not admit that any such agreement was evidenced by any memorandum as stated: they also denied that the key was handed to them or their agent, or that anything was due to them for rent or otherwise.

The Plaintiffs then took out a summons, under Rules of the Supreme Court, 1883, Order XXXI., r. 1, for leave to deliver interrogatories. Upon the summons coming on for hearing the Chief Clerk adjourned it in order that the Plaintiffs might deliver a copy of the proposed interrogatories to the Defendants, and that he might himself peruse them before granting an order. A copy of the interrogatories as drawn by counsel was then sent to the Defendants, and on the second hearing of the summons the Chief Clerk again adjourned it in order that the interrogatories might be condensed. Counsel having considered that the interrogatories should stand as proposed, the matter again came before the Chief Clerk, who thereupon proceeded himself to condense them, and made an order for leave to deliver them as so settled by him.

The Plaintiffs insisting that the interrogatories should remain as settled by counsel, the summons was adjourned into Court.

The relevancy of the interrogatories was not called in question by the Defendants.

The following is a sample of the interrogatories as originally settled by counsel and afterwards condensed by the Chief Clerk, the parts struck out by the Chief Clerk being denoted by brackets:

"Did not the said *George Barton* give [or send] the said key to the Defendants [or one and which of them]; and did not the Defendants [or one and which of them, and whether or not] by

V.-C. B. 1886 SWABEY v. DOVEY.

means of the said key [or how otherwise] enter into and upon the said hereditaments [or some and what part thereof]?"

*Renshaw*, for the Plaintiffs:—

The Chief Clerk had no right either to require the production of a copy of the proposed interrogatories, or to settle them on the application for leave to deliver them: his jurisdiction at that stage is confined to giving or refusing leave: Rules of the Supreme Court, 1883, Order XXXI., r. 1; *Hall* v. *Liardet* (before Mr. Justice *Field* in Chambers, 12 Nov. 1883). It is only necessary for the applicant to shew generally that it is a proper case for interrogating: if the interrogatories are improper the party objecting should proceed under rules 6 and 7: *McIlroy* v. *Duncan* (before Mr. Justice *Field* in Chambers, 19 Feb. 1884). Rule 3 deals with the costs of unreasonable or prolix interrogatories.

*J. G. Wood*, for the Defendants:—

The Chief Clerk, on the hearing of the summons, had a right to look into and settle the interrogatories, and thus save the expense of a separate application to strike out.

BACON, V.C.:—

The power given by the rules 1 and 7 of Order XXXI. is to strike out interrogatories if irrelevant. The Chief Clerk might, if he found these interrogatories irrelevant, have struck them out on the application for leave to deliver them, and it would not have been necessary to take out a second summons for the purpose. The interrogatories here cannot be said to be irrelevant, the Chief Clerk ought, therefore, to have allowed them to be delivered. There will be an order for leave to deliver the interrogatories.

Solicitors: *Roberts & Barlow; A. F. Benning.*

G. I. F. C.

## HENDRY *v.* TURNER.

KAY, J.
1886
March 22.

[1884 H. 3757.]

*Partnership—Dissolution by mutual Consent—Refusal to sign Notice for insertion in the Gazette—Action to compel Signature—Jurisdiction.*

The Court has jurisdiction to compel a retiring partner to sign a notice of dissolution for the *Gazette* in an action in which no other specified relief is claimed.

THE Plaintiff and the Defendant, American gentlemen, in June, 1883, entered into partnership for the purpose of carrying on in *London*, as the principal place, and at *Philadelphia, U.S.A.*, the business of bankers and brokers. Upon the 30th of April, 1884, they mutually agreed to dissolve partnership, the terms being that the Defendant, *Turner*, in whose name the business had been carried on under the style of *A. P. Turner & Co.*, should buy the share of the Plaintiff and carry on the business under the old style. Both partners signed a document dated the 1st of May, 1884, intended as a circular to be addressed to the customers of the firm, but it was never sent out. It was as follows:—"The partnership heretofore existing between *Alexis Paul Turner*, Esq., and *John Burke Hendry*, Esq., as general bankers and brokers at 207, *Walnut Place, Philadelphia*, and at 50, *Threadneedle Street, London*, was dissolved on the 30th of April, 1884, by mutual consent. *A. P. Turner* has taken over the business and will continue the same under the former name, and is alone authorized to sign for indebtedness to the firm, and is likewise prepared to pay all assumed debts owing by the late firm." About the same time a circular in the form following was prepared by the Defendant, and sent by him to all the firms and persons who had had business relations with the firm:—"207, *Walnut Place, Philadelphia*, May, 1884. You are hereby notified that the partnership heretofore existing between *John Burke Hendry* and the undersigned, both of *Philadelphia*, as general bankers and brokers, under the style of *A. P. Turner & Co.*, at the above address, with an agency branch at 50, *Threadneedle Street, London*, was dissolved the 30th of April, 1884. The undersigned has

KAY, J.
1886
HENDRY
v.
TURNER.

taken over the business and will continue the same, and is alone authorized to sign for indebtedness to the firm, and is likewise prepared to pay all assumed debts owing by the late firm. *Alexis Paul Turner* for *A. P. Turner & Co.*"

It was afterwards desired by the Plaintiff, *Hendry*, and in August, 1884, it was arranged that a notice of the dissolution of partnership should be inserted in the *London Gazette*. Accordingly a notice, which was in the form following, was prepared and discussed by the parties:—"Notice is hereby given that the partnership heretofore subsisting between *Alexis Paul Turner* and *John Burke Hendry*, in the business of bankers and brokers, now carried on by us under the style of *A. P. Turner & Co.*, at *Philadelphia*, in the *United States of America*, and 50, *Threadneedle Street*, in the city of *London*, *England*, was dissolved by mutual consent on the 1st day of May, 1884, and the said business will as from the 1st day of May, 1884, be carried on by the said *Alexis Paul Turner* alone, who will receive and pay all debts owing to or by the said late firm."

That notice was submitted to the Defendant *Turner* for his signature, and he expressed a wish to have inserted therein after the words "*United States of America*, and" the words "having an agency branch under the same name at" 50, *Threadneedle Street*, in the city of *London*. These words were not in the first circular. The Plaintiff objected to the additional words, and after considerable correspondence the Defendant refused to sign that or any other notice without the insertion of the words. Ultimately, after ample previous notification by the Plaintiff of an intention to bring an action if the Defendant persisted in his refusal, a writ in an action was issued on the 26th of September, 1884. It asked in a somewhat unusual form for "an injunction directing the Defendant to sign and deliver to the Plaintiff's solicitor the notice of dissolution of a certain partnership formerly existing between the Plaintiff and the Defendant," and on the 26th of October, 1885, a formal notice of motion was on behalf of the Plaintiff given that the Defendant might be directed by order and injunction to sign in the presence of the Plaintiff's solicitor, and to deliver to him so signed, the notice of dissolution of the partnership, which notice had been tendered to the Defendant for

his signature, or in default that the Defendant, &c., or in default that the Plaintiff, or some other person, might be nominated to sign the notice in the presence of the Plaintiff's solicitor, and to deliver the same to him. On the hearing the Defendant appeared by counsel, and gave an undertaking to sign such notice of dissolution for insertion in the *London Gazette* as might be settled by the Judge in Chambers, in case the parties differed. Eventually the notice was signed, omitting the words which the Defendant had, before the writ in the action was issued, insisted upon having inserted therein. No order was made on the motion except that the costs should be costs in the action.

On the 15th of December, 1885, a summons was taken out on behalf of the Plaintiff, asking that the Defendant might be ordered to pay his costs of the action, including those of the application, or for directions as to the mode of trial of the action. It was agreed by the parties to have the question of costs, which was the only question really remaining, decided upon the summons, which was adjourned into Court for that purpose.

*Hastings*, Q.C., and *J. Bigland Wood*, for the Plaintiff, after stating the facts, submitted that the Defendant ought to be ordered to pay all the costs.

*W. Pearson*, Q.C., and *Cree*, for the Defendant:—

The Court has not in a case where a partnership has been dissolved by mutual consent, jurisdiction to direct the Defendant to insert a notice of the dissolution in the *London Gazette*. The partnership was dissolved out of Court in April, 1884, and the only purpose of the action brought in September, 1884, was to compel the insertion of a notice of it in the *Gazette*, and for that there is no authority. If an action be brought to dissolve and to wind up a partnership, the Court will in the course of the proceedings give directions for the insertion of notices in the *Gazette*—it having seisin of the whole matter after the order for dissolution, will do what may be necessary. When the motion was made in November last, an undertaking was given to sign a notice; the matter was not discussed, and no order was made. The only object in inserting notice in the *Gazette* is to make known to the

KAY, J.
1886
HENDRY
v.
TURNER.

customers of a firm the fact of dissolution, and to save partners from liability; but here that was wholly unnecessary, as a printed notice was sent to all who had dealings with the firm long before the action was commenced. Notice, whether in the *Gazette* or otherwise, is quite sufficient to prevent future liability to retiring partners. To persons not customers during the partnership, but after the dissolution, there would be no liability. The fact is clear, that the parties on the 1st of May, 1884, signed a document which contained everything necessary for insertion in the *Gazette*, and the Plaintiff could have ordered insertion of it if he had chosen to take the trouble to do it. The signatures were not attested, but that was not necessary. The Plaintiff knew that the Defendant signed it, and could have made the statutory declaration required at the *Gazette* office, and he would thus have saved all the annoyance of this action. At the time of dissolution the *London* house was a branch, and the Defendant was right in asking that that fact should be stated in the notice. The action ought to be dismissed, and if not with, certainly without costs.

*Hastings*, in reply, referred to *Lindley* on Partnership (1), where it was stated on the authority of several cases that public notice by advertisement in the *Gazette* is sufficient not only against all who can be shewn to have seen it, but also as against all who had no dealings with the old firm, whether they saw it or not.

KAY, J.:—

In this case the Plaintiff and the Defendant have consented, and very wisely, to submit the question between them to be decided upon this summons, and have by doing so given the Court jurisdiction. [His Lordship, having stated the facts as above set forth, continued:—] Nothing now remains to be decided but the question of the costs in the action, and they are out of all proportion to the matter at issue. The Defendant has objected that the Court has no jurisdiction to make an order like that asked for by the writ in the action; but why has it not? It was admitted that in an action for the dissolution and winding-up of a partnership business it is quite competent to the Court to order

(1) 4th Ed. vol. i. p. 415.

the partners to sign a proper notice of the dissolution for the purpose of the same being inserted in the *London Gazette*. There is the case of *Troughton* v. *Hunter* (1), which does not appear to have been dissented from and is stated by Lord Justice *Lindley* in his book on Partnership (2). That was a suit for the dissolution of a partnership. The plaintiff asked for a declaration of dissolution, and that the defendant might be decreed to do all acts necessary for procuring notice thereof to be inserted in the *London Gazette*, and the defendant not appearing the Master of the Rolls made the order as asked. Therefore I have no doubt whatever that as part of the machinery, if I may call it so, in the winding-up of a partnership the Court has and has exercised jurisdiction to call upon the partners to sign a proper notice of the dissolution for insertion in the *London Gazette*. The purport and object of that is apparent, as is stated by Lord Justice *Lindley* in his Book on Partnership (3), where a large number of authorities are collected. It is there said that "public notice given by advertisement in the *Gazette* is sufficient, not only against all who can be shewn to have seen it, but also as against all who had no dealings with the old firm, whether they saw it or not. But an advertisement in any other paper is no evidence against any one who cannot be shewn to have seen it." So that there is an obvious reason for having the notice of the dissolution inserted in the *London Gazette*. If the Court has the jurisdiction, which I think it has frequently exercised, to order partners in the winding-up of a partnership to sign notices of the dissolution for insertion in the *Gazette*, why should not the Court have jurisdiction to order the notice of the dissolution to be advertised in a case where there remains only that one point to be determined, without its having previously had anything to do with the winding-up of the partnership. In this case there is a prayer for general relief, but the Plaintiff did not wish to resort to the Court for any other matter than to have the notice signed for insertion, and I am not at all inclined to shorten the arm of the Court where it has jurisdiction to direct an act like that to be done in the winding-up of a partnership, by refusing to make an order to that extent.

(1) 18 Beav. 470. (2) 4th Ed. vol. i. p. 408.
(3) 4th Ed. vol. i. p. 415.

KAY, J.
1886
HENDRY
v.
TURNER.

Upon the question of jurisdiction therefore I feel no difficulty whatever; I hold that the Court has such jurisdiction. Upon the other question, whether the costs should be paid by one party or the other, I have some hesitation. There would have been no harm done to the Plaintiff if the words which he objected to had been inserted in the notice, but the fact remains that he had signed a document in which there were no such words. It may be asked why did he object? The Defendant, requiring the words to be inserted, compelled the Plaintiff, as he says, to bring an action to have the notice signed. After considering all the circumstances, and reading the evidence, I have come to the conclusion that the balance of it is against the Defendant. The Plaintiff was in my opinion perfectly right in requiring the Defendant to sign the notice. The Defendant having objected to do that the Plaintiff had to take one of two courses: either to insert the notice with the words which the Defendant insisted upon, or to bring an action to compel the Defendant to sign the notice. The advertisement could not be inserted in the *Gazette* without the signatures of the partners and a statutory declaration of attestation by a solicitor to the effect that the notice had been duly signed. The document signed on the 1st of May, 1884, could not have been inserted. Why did the Defendant wish to have the additional words inserted? It seems to me by doing so he put himself in the wrong, and therefore I must order him to pay the costs, but considering the course which has been pursued the Taxing Master must have regard to whether all the proceedings were necessary and tax the costs accordingly.

Solicitors: *Cooper & Sheild; H. C. Barker.*

T. F. M.

CHITTY, J.
1886
March 30.

## *In re* CURREY.
## GIBSON *v.* WAY.

[1885 C. 5728.]

*Settlement—After-acquired Property—Restraint on Anticipation.*

A restraint on anticipation is equivalent to a restraint on alienation, and accordingly the shares of married women in residuary real and personal estate given to them by will for their separate use without power of anticipation, are not bound by covenants for settlement of after-acquired property contained in their respective marriage settlements; and the capital of the personal estate is not payable to them on their separate receipt.

By his will, dated the 14th of September, 1883, Dr. *Currey* gave all the residue of his real and personal estate to his two daughters, *Frances Georgiana* (Mrs. *Gibson*), and *Emma Augusta* (Mrs. *Way*), in equal shares, as tenants in common, with a proviso "that every gift hereby made to or for the benefit of either of my said daughters shall be for her separate use independently of any husband, and without power of anticipation."

Upon the marriage of Mrs. *Way* a settlement, dated the 4th of September, 1876, was executed, which contained a covenant by Mr. and Mrs. *Way* that if she (*Emma Augusta Currey*) "now is, or if at any time or times during the said intended coverture she or the said *W. R. Way* in her right shall become, entitled by descent, devise, bequest, gift, representation, purchase, or otherwise to any real or personal property of the value of £200 or upwards at any one time for any estate or interest whatsoever—then and in every such case the said *W. R. Way* and *E. A. Currey* and all other necessary parties shall at the cost of the trust property thereby settled on behalf of the said *E. A. Currey*, as soon as circumstances will admit, convey, assign, surrender, and assure the said real or personal property to the trustees or trustee for the time being of these presents, upon trust that they or he shall with all convenient speed, and in such manner as they or he shall think fit, sell, or call in, or convert into money the said real and personal estate, and stand possessed of the proceeds," upon the trusts already therein declared of and con-

CHITTY, J.
1886
*In re* CURREY. GIBSON *v.* WAY.

cerning a sum of £6000—which were to pay the income to the wife for life for her sole and separate use, without power of anticipation, and after her death to the husband for life, and after the death of both in trust for the children of the marriage.

The marriage settlement of Mrs. *Gibson*, dated the 12th of June, 1882, contained a similar covenant on the part of Mr. and Mrs. *Gibson*.

Dr. *Currey* died on the 30th of April, 1885, and his residuary estate consisted of a considerable sum of personalty and a freehold estate at *Hampstead*.

An originating summons had been taken out raising the questions:—

1. Whether the shares of Mrs. *Gibson* and Mrs. *Way* in the residuary personal estate of the testator ought to be transferred to them respectively, notwithstanding the restraint on anticipation contained in the testator's will.

2. Whether the shares in the residuary real estate and in the residuary personal estate of the testator, or either of them, given to Mrs. *Gibson* and Mrs. *Way* respectively for their separate use, without power of anticipation, were or were not bound by the covenants for settlement of after-acquired property contained in their respective marriage settlements.

It was also sought to obtain the approval of the Court to an agreement by way of exchange and compromise relating to a portion of the testator's real estate, and to bind the interests of Mrs. *Gibson* and Mrs. *Way*, notwithstanding the restraint on anticipation attached to their interests.

*Spencer Butler*, for the executors of Dr. *Currey*:—

Having regard to the restraint on anticipation imposed by the testator in the gift of his residuary real and personal estate to his daughters, their shares in the personal estate could not be paid to them on their separate receipt, and the real estate could not be transferred to the trustees of their marriage settlements for the purpose of being settled as after-acquired property. With regard to the personalty, *Re Sarel* (1); *In re Ellis' Trusts* (2); *In re Benton* (3), are clear authorities.

(1) 4 N. R. 321. (2) Law Rep. 17 Eq. 409. (3) 19 Ch. D. 277.

[CHITTY, J.:—As a matter of law I should admit that if the property goes to the married woman to her separate use without power of alienation, that that is a good restraint on alienation in regard to *corpus*: consequently if she has covenanted to settle it her covenant will not apply to that property, because she has no property to alienate except under the *Conveyancing Act: Robinson* v. *Wheelwright* (1).]

Then with respect to the real estate, a restraint upon anticipation and a restraint upon alienation have been treated as having the same effect: *In re Bown* (2); *Cooper* v. *Macdonald* (3); *Baggett* v. *Meux* (4); *In re Ellis' Trusts* (5); *In re Vardon's Trusts* (6); and as the effect of transferring the real estate to their trustees will be that it must be converted according to the trusts of the settlements, it falls within the prohibition imposed by the testator.

*G. S. Barnes*, for the trustees of the marriage settlements:—

The shares of Mrs. *Gibson* and Mrs. *Way* in the residuary real and personal estate of the testator ought to be transferred to them respectively, and then such shares will be bound by the covenant to settle after-acquired property. I rely upon *In re Bown*, where, under an absolute gift in reversion followed by a restraint on anticipation, the Court of Appeal held that the money ought to be paid to the lady notwithstanding she was restrained from anticipation.

[CHITTY, J.:—I do not so read that case. The restraint on anticipation, the fetter, had fallen off, and, to use a metaphor, the lady could walk out of prison. I understand that to be what the Court of Appeal decided.]

CHITTY, J.:—

The question is whether the shares of the two married ladies in the residuary personal estate of the testator ought to be transferred to them by the trustees of Dr. *Currey* in the face of the declaration which is contained in the will itself as to restraint on

(1) 6 D. M. & G. 535.
(2) 27 Ch. D. 411, 414, 418.
(3) 7 Ch. D. 288, 293.
(4) 1 Coll. 138; 1 Ph. 627.
(5) Law Rep. 17 Eq. 409.
(6) 31 Ch. D. 275, 280.

CHITTY, J. 1886 *In re* CURREY. GIBSON *v.* WAY.

anticipation. The testator gives the residue of his real and personal estate to his daughters, the two married ladies, in equal shares, and then declares that "Every gift hereby made to or for the benefit of either of my said daughters shall be for her separate use, independently of any husband and without power of anticipation."

On the construction of this will it is clear that this restraint on anticipation applies to the *corpus* of the gift itself. I have no hesitation in saying that on the construction of this will the trustees cannot transfer the shares of the personal estate to these married ladies. It was argued that the point had been decided by the Court of Appeal in *In re Bown* (1), but all that was done there was to construe the will, and the Court of Appeal held that on the true construction of that instrument the restraint on anticipation applied to the married woman's interest while that interest was reversionary, but did not apply when the interest fell into possession. Now there is no such question of construction possible to be maintained on this will. The law is clear on the subject that you can confer on a married woman by means of her separate use the power of dealing with property that is her own, and at the same time you can superadd to that such a condition as would prevent her dealing with it in any way during her life. That seems to me to be the effect of this will. Then the question arises whether the shares of the same ladies in the real estate of the testator as well as in his personal estate are bound by the covenants which they entered into in their marriage settlements.

The covenant is that if at any time during the intended coverture the married lady or her husband in her right should become entitled in manner mentioned to any real or personal estate, such property shall be settled, and the first material trust is to convert the property into money; so that real estate, if it fell within the covenant, would have to be sold by the trustees, and the proceeds would be held on trusts to pay the income to the married lady herself for her separate use without power of anticipation, and after that, the settlement proceeds in the usual way, conferring a life interest on the husband, with remainder to the children, and so on.

Now in regard to the land, can these ladies convey? It

(1) 27 Ch. D. 411.

appears to me that they cannot. They are restrained from anticipation, and it has been held by Mr. Justice *Kay*, and I think rightly, that there is no distinction, for the purposes of a clause of this character, between the restraint on anticipation and the restraint on alienation. If the married ladies were to convey in accordance with the covenant the result would be that the property which the testator has said in substance they are to enjoy *in specie* without power of anticipation will be converted into money, and though the conveyance will be made in pursuance of the covenants in the marriage settlement, clearly the conveyance will be an alienation, and it will change the nature of the property, and it will result, too, in conferring interests on other persons by an act *inter vivos* when the testator has declared by a clause which the law holds to be valid that the ladies shall not anticipate, which I understand to be the same thing as that they shall not alienate. I think the clause does refer to such alienation as this; and that the shares in the real estate are not bound by the covenant. These observations that I have made in regard to the real estate apply *à fortiori* to personalty, because they have no control, as I have already held, over their shares in the personal estate, the legal interest in those shares being vested in the trustees and the fund remaining in Court.

On the further question as to sanctioning an agreement for a compromise, under which it had been agreed that for the purpose of quieting the title a portion of the testator's estate should be exchanged, his Lordship made a declaration that the agreement being for the benefit of the married women the restraint on anticipation should be removed so far as regarded any title or interest they might have under the testator's will in the portion of each estate proposed to be dealt with by the agreement.

Solicitors: *Currey, Holland, & Currey.*

F. G. A. W.

CHITTY, J.

1886

*April* 7, 8.

## *In re* ORIENTAL BANK CORPORATION.

### MacDOWALL'S CASE.

*Company—Winding-up—Servants' Salary—Notice of Discharge.*

The rule that an order for winding up a company operates as a notice of discharge to the servants when the business of the company is not continued after the date of the order, applies though the liquidator without continuing the business employs the servants in analogous duties with a view to reconstruction.

*Chapman's Case* (1) followed.

*Ex parte Harding* (2) distinguished.

ADJOURNED SUMMONS.

On the 3rd of May, 1884, a petition was presented for winding up this corporation, and on the same day a provisional liquidator was appointed, who on the 13th of May issued a letter or minute to the clerks of the corporation, which so far as is material was as follows: "I recognise the duty of considering as far as possible the interests of the staff. It may be convenient to some if I state, that without abandoning my right to terminate any employment without notice, I wish where I can to give a little notice to those concerned. As soon as circumstances will permit I shall consider what abatements must be made in the staff on account of there being less work to be done than heretofore. Probably I may be able to give a fortnight's notice to those I am compelled to part with. Many will necessarily be retained for a considerable period on account of the continued need of their services. I shall probably revise the list on Saturdays only, so that on no other day need any employé fear the issue of a notice to quit. Where gentlemen are home on furlough, and are not by the regulations of the corporation compelled to work for their half-pay, I shall nevertheless have to require service from them in exchange for their pay, as may be arranged with the heads of the departments, otherwise they will have to rely on their claim for damages. As there are strong hopes of a reconstruction of the bank, I am

(1) Law Rep. 1 Eq. 346. (2) Law Rep. 3 Eq. 341.

led to defer doing anything destructive to its re-organization, hence I shall be chary of reducing the staff just at present."

CHITTY, J.
1886
MACDOWALL'S CASE.

On the 15th of May the order for winding-up the corporation was made, and on the 19th of June following the provisional liquidator was appointed official liquidator.

The agreement under which the clerks of the corporation had been engaged provided that they should accept three months' notice for the determination of their engagements, such notice to take effect at any period without reference to the dates of the commencement of their employment.

The Applicant was at the commencement of the winding-up employed as chief clerk in the public loan department at a salary of £275 per annum, and from that time until the 30th of August following continued to act as clerk, first in the loan department, and afterwards in the share department, and during that time he received from the official liquidator the proportion of his salary of £275.

On the 19th of August the Applicant (together with other clerks) received a notice from the official liquidator that after the end of that month his services would no longer be required, and accordingly at the date named ceased to give his services as clerk. The Applicant now claimed against the corporation to be paid the sum of £68 15*s.* for salary in lieu of three months' notice, after giving credit for the proportion of salary received by him for the period between the 19th of August and the end of that month.

This was a test case.

*Ince*, Q.C., and *Stirling*, for the Applicant:—

Where a winding-up order is made and the business of the company is actually stopped, then the winding-up order operates as notice of discharge to all the servants of the company: *Chapman's Case* (1).

Where, however, the business is carried on after the winding-up order, then the old contract between the company and its servants continues in force, and notice of discharge must be given pursuant thereto: *Ex parte Harding* (2).

That authority governs this case, as here the business was

(1) Law Rep. 1 Eq. 346. (2) Law Rep. 3 Eq. 341.

CHITTY, J. 1886 MACDOWALL'S CASE

actually continued after the winding-up order, and the liquidator by his minute of the 13th of May informed the clerks that they were not to be discharged.

[They also referred to *Thomas* v. *Williams* (1).]

*Macnaghten*, Q.C., and *Latham*, for the official liquidator:—

*Chapman's Case* (2) is an express authority on the question and has never been questioned. The circumstances in *Ex parte Harding* (3) were different, as the proceedings under the winding-up order were subsequently stayed, and an order for winding up under supervision made. Vice-Chancellor *Wood* considered there was sufficient in that case to take it out of the decision of the Master of the Rolls (Lord *Romilly*) in *Chapman's Case*. The business of the corporation entirely ceased when the winding-up order was made. The liquidator continued the clerks on in order to assist him in the machinery of the winding-up.

*Ince*, in reply.

CHITTY, J.:—

The decision of Lord *Romilly* in *Chapman's Case* was intended to establish the principle that, in my opinion, it did establish. It was a statement by Lord *Romilly* of what the practice was which prevailed up to the time of his giving that decision in 1866, and the rule which was established in that case has, as I know, been acted upon in the Rolls Chambers ever since. Now the rule is this—that an order for winding up a company is notice of discharge to all the persons in the employment of the company. That decision has never been overruled or questioned. I consider myself not at liberty even to question the propriety of it. I may say at the same time that it seems to me to be founded upon good sense.

Now it is said in this case that the business of the company was continued, but that proposition cannot be sustained in point of fact. The bank closed its doors, and ceased to carry on business even before the date of the winding-up order. There were

(1) 1 Ad. & E. 685. (2) Law Rep. 1 Eq. 346.
(3) Law Rep. 3 Eq. 341.

no doubt some hopes of a reconstruction, but not by means of the old corporation being resuscitated, and itself carrying on its old business; there were certain hopes, which have to a certain extent been realised, of a new company being started to take over the business of the bank; but the banking business ceased, if not before, at any rate at the date of the winding-up order. What has been done is this—many of the persons in the employment of the bank have gone on rendering services of a nature somewhat analogous to those that were rendered to the old corporation and the court of directors, whose orders they agreed to obey. But it has been a different business. It has been the business of winding up the affairs of the bank, and there has been no carrying on of the banking business in any proper sense of that term.

That being so, I will now consider the position of Mr. *MacDowall.* I may say at once it is obvious that the winding-up of a great bank, such as this was, is a misfortune, and a serious misforture, to all the persons who are in its employ. I should be sorry to adopt any rule of law which in any way made that misfortune harder to them than it is. Now, what was done? A liquidator was appointed provisionally, who had not the powers of an official liquidator, and the same gentleman was afterwards appointed official liquidator. There are cases in which the business of the company ordered to be wound up is continued; it does happen occasionally that the business is carried on with a view to the sale of the business as a going concern, so that the goodwill may be preserved. In those cases it is competent for the official liquidator, and probably he requires the sanction of the Court, but either with or without the sanction of the Court (it is needless to stay now to consider whether he would require such a sanction) it would be competent for him to continue the business, and in that case to waive the effect of notice of the winding-up order—it appears to me that there must be something done in a clear and unmistakable way. For instance, after notice of the winding-up order the official liquidator could say to the persons in the employment of the bank, "I propose not to treat the winding-up order as a discharge, and will you waive it also?" It would be competent, to my mind, for the liquidator to

CHITTY, J. 1886 MACDOWALL'S CASE.

do that. It would be competent, on the other hand, for those who agreed to serve the company to say: we will not serve you; we will not accept your terms; we will take the winding-up order as a notice of discharge." In order to sustain a case of waiver of the notice it appears to me that the facts ought to be clear. On looking at the facts of this case I think nothing of the kind was established.

Mr. *Ince* in his argument, when he opened the case, treated the minute that was sent for the information of the staff, written by the liquidator, who was then the provisional liquidator, before the date of the winding-up order, as an immaterial letter. Afterwards, and particularly during his reply, he attempted to found his case upon the minute; but I have been at a loss, although I have attended attentively to what he said, to follow the case so presented to any legal conclusion. I do not understand it to be argued, and I am satisfied it could not be argued, that there was any novation in this case—that there was any new contract on the part of the liquidator to take Mr. *MacDowall* and the other persons in a similar position into his employment. If he had taken them into his employment, and that had been properly sanctioned, then that would have entitled them to have been paid in full, because they would be serving the liquidator in the course of the winding-up. The letter of the provisional liquidator, first of all, could not do that, for he had not the authority when he wrote it; and, secondly, if the letter is to be considered as adhered to by him after he became the permanent official liquidator, I think the letter will not bear any such construction. He says in the minute that he recognises "the duty of considering as far as possible the interests of the staff." I may stay to observe that I think the letter is written in a good spirit by the liquidator, who was aware of what a serious misfortune it is to persons in the employment of such a bank as this suddenly to find that they are discharged. He goes on to say:—[His Lordship read the extract of the minute of the 13th of May above set out]. Now, that part of the minute appears to me to shew, first, that the liquidator was desirous of mitigating as far as he could the hardship of the position in which the persons in the employment of the bank found themselves; and, secondly, he does not say he

shall continue them all, but that some may be kept on. Of course, persons in the employment of the bank in the position of Mr. *MacDowall* were entitled to three months' notice. Three months' notice is the notice which the law in an ordinary case allows and requires for a person in the position of Mr. *MacDowall*. The liquidator does not stand upon that, because there was the express power in the contract under which he was serving to terminate his employment by a three months' notice. The three months' notice, of course, would have to be given by the directors, or those who were entitled to make use of the name of the corporation. Then the liquidator goes on to say, "As there are strong hopes of a reconstruction of the bank, I am led to defer doing anything destructive to its re-organization; hence I shall be chary of reducing the staff just at present." It seems to me that the letter does not amount to a waiver of the notice of discharge. There is no evidence to shew there was any agreement whatever between the liquidator, now representing the corporation, and the persons in the corporation's employment that they should go on under a new contract similar in terms to the old contract. I think, therefore, that the result is this: the notice of the winding-up order operated as a discharge to Mr. *MacDowall* and others in a similar position, and that notice of discharge has never been waived, and there has been no new employment. But the liquidator has allowed Mr. *MacDowall* to continue rendering to the corporation services analogous to those which he was rendering to the corporation before it was ordered to be wound up, and Mr. *MacDowall* was content to remain upon those terms. It is not necessary to shew that there was any assent on his part beyond this—that he remained and served. The result is that he remained and served, and he has been paid his salary in full, and I am happy to find he was paid his salary in full for a period exceeding three months after notice of the winding-up order. The case is therefore analogous to this—a domestic servant is entitled to a month's notice, or wages in lieu of it. Notice is given and his contract of service terminates with the notice. It is said by Mr. *Ince* that Mr. *MacDowall* remained a few days after the termination of the three months, and I am asked to infer from that circumstance alone, and nothing more, that there was a new contract of hiring upon the old terms; that is to say, he was to continue now under

CHITTY, J. 1886 MACDOWALL'S CASE.

the orders of the liquidator, the officer carrying on the business, on the same terms in other respects as are to be found in the contract between Mr. *MacDowall* and the bank. I should be straining the facts to a most unjustifiable extent if I drew any such inference from what occurred. It would be the same as the case I put of a domestic servant allowed to stay two or three days beyond the time when the notice expired; and the argument goes to this—that there would be a new contract to be inferred from his or her so staying on. That, to my mind, is an absurdity. All that can be inferred is, that during that time—the two or three days, or the couple of weeks, as was the case here—there shall be wages paid, or a salary, which is the proper term in the case before me, at the same rate as was previously paid. No presumption or inference can be raised or drawn that the old term of service was renewed.

It is said in order to come to the conclusion at which I have arrived I must be over-ruling Lord *Hatherley's* judgment in *Ex parte Harding* (1). I consider that not to be so. The case that Lord *Hatherley* was considering when Vice-Chancellor was the case in which, as I understand the report, the business of the company as such was continued. No doubt if that were the case, the liquidator having continued the business, there might be grounds for saying, and the Vice-Chancellor found there were grounds in that case for saying, that either the notice had been waived or there was a new contract on the same terms. I think that the two cases of *Chapman's Case* (2) and *Ex parte Harding* can stand together. I am satisfied that Lord *Hatherley* did not intend, if even he had the authority so to do, to over-rule *Chapman's Case*, and in the report I find, so far from thinking he was over-ruling it, Lord *Hatherley* said he thought there were sufficient facts in the case before him to take it out of the Master of the Rolls' decision in *Chapman's Case*. This is an acknowledgment of the authority of the case itself.

I think therefore that the claim fails.

Solicitors: *Murray, Hutchins & Stirling; Freshfields & Williams.*

(1) Law Rep. 3 Eq. 341. (2) Law Rep. 1 Eq. 346.

G. M.

## *In re* MASONIC AND GENERAL LIFE ASSURANCE COMPANY.

PEARSON, J.

1885

Dec. 12.

*Company—Winding-up Petition—Locus Standi—Petition by Executor—Probate obtained after presentation of Petition.*

The executor of a creditor of a company is entitled to present a winding-up petition before he has obtained probate; it is sufficient if he has obtained probate before the hearing of the petition.

PETITION for the winding-up of the company.

The Petitioner alleged that she was the widow and executrix of *Benjamin Collenette*, of the island of *Guernsey*, who died there on the 24th of November, 1884, and "your Petitioner has proved his will;" that the testator on the 14th of April, 1870, effected with the company a policy of insurance on his own life for £300, on which he had paid the premiums; that notice of his death was given to the company, who had admitted the claim as payable three months from the 11th of June, 1885; that various applications for payment had since been made without success; and that the company was unable to pay its debts.

The petition asked that the company might be wound up by the Court.

The will of the testator was proved by the Petitioner in *Guernsey* in December, 1884.

The petition was presented on the 18th of November, 1885.

The probate was not stamped in *England* until the 3rd of December, 1885, after the petition had been in the paper for hearing.

Another winding-up petition was presented by a creditor, who claimed in respect of money due to him for work done for the company.

*Cookson*, Q.C., and *F. B. Palmer*, for the first petition.

*Cozens-Hardy*, Q.C., and *Rose-Innes*, for the second petition.

*Cozens-Hardy*, Q.C., and *MacSwinney*, for a judgment creditor.

PEARSON, J.

1885

*In re* MASONIC AND GENERAL LIFE ASSURANCE COMPANY.

*Bramwell Davis*, for a policy-holder.

*Napier Higgins*, Q.C., and *T. L. Wilkinson*, for the company:—

The first petition is demurrable, and it ought to be dismissed with costs. The Petitioner was not entitled to present it until she had obtained a valid probate in *England*. She could not have maintained an action at law if, at the time of the issue of the writ, she was not the duly constituted personal representative of the testator in *England*. A winding-up order is a statutory execution. The evidence shews that the company is perfectly solvent.

*Cookson*, in reply:—

The rule that an executor may prove his title at the hearing is not limited to administration actions.

PEARSON, J. (after stating the facts, continued):—

It is said that the first petition is demurrable, because the Petitioner did not allege in it that she was the duly constituted executrix by a valid probate obtained in this country. In my opinion the petition is not demurrable. The Petitioner is the executrix of the testator, and she could have given a valid receipt for the money before obtaining probate.

The company having tendered payment of the debts of all the creditors who were before the Court,

HIS LORDSHIP did not make a winding-up order, but he ordered the company to pay the costs of both the Petitioners.

Solicitors: *Chester & Co.; C. A. Angier; Marshall; Munns & Longden; Browne & Maunder.*

W. L. C.

## LORD DYNEVOR *v.* TENNANT.

PEARSON, J.

1886

*March* 18.

[1885 D. 478.]

*Easement—Grant—Extinguishment—Lease—Merger.*

In 1820 the owners granted a lease of a strip of land intersecting their estate for the purpose of a canal, with a proviso that the lessors, their heirs, and assigns, might use the demised land for road and other purposes, so as not to injure the canal. In 1838, *A.*, *B.*, and *C.*, the then co-owners of the estate, by partition deed conveyed the reversion of part of the canal to the use of *B.*, and the abutting lands to *A.* and *C.* severally. In 1839 *B.* conveyed the reversion in that part of the canal to the lessees:—

*Held*, that whether the proviso in the lease did or did not operate as a re-grant of an easement, the merger of the lease put an end to the right conferred by the proviso in respect to that part of the canal.

IN the year 1820, an estate in *Glamorganshire*, known as the *Neath Abbey* estate, was owned in undivided thirds. The then Lord *Dynevor* was owner in fee of one third, *Henry Combe Compton* was owner in fee of another third, the remaining third was settled, Lord *Dynevor* being tenant for life of one moiety and *Sarah Doyley* of the other moiety, with power for the tenants for life to lease. By an indenture dated June, 1820, Lord *Dynevor*, *Henry Combe Compton*, and *Sarah Doyley* demised a strip of land, part of the *Neath Abbey* estate, to *Henry Tennant* for the term of 1000 years, for the purpose of a canal, which was afterwards made, save and except out of such demise all brooks, rivulets, and streams water flowing or to flow over or through the land or ground thereby demised, or any part thereof, and which then were, or should or might at any time thereafter be, used for the purpose of supplying any mill or mills, or other machinery, with full and free liberty to and for the said *George Talbot Rice* Lord *Dynevor*, *Henry Combe Compton*, and *Sarah Doyley*, their heirs or assigns, to divert or turn or otherwise use such brooks, rivulets, or streams of water, or any of them, in like manner as they could or might have used the same if such lease had not been granted. The lease also contained the following proviso:—"Provided always, and it is hereby expressly declared and agreed between and by the said

PEARSON, J. 1886 LORD DYNEVOR v. TENNANT.

parties hereto, that nothing herein contained shall prevent or hinder the said *George Talbot Rice* Lord *Dynevor*, *Henry Combe Compton*, and *Sarah Doyley*, their heirs or assigns, from using all or any of the land or ground hereby demised, or intended so to be, or any stream or streams of water flowing over or through the same, or from granting any wayleaves or roads over or across the same for the carriage of coal, goods, wares, or merchandises, or for any other purpose or purposes whatsoever, in like manner as they could or might have used the same in case this present lease had not been granted, but so nevertheless as not to prejudice or injure the said canal intended to be made as aforesaid, or the navigation thereof, or any road or towing path, work or works which shall or may be made or constructed for the use or convenience of the same by the said *George Tennant*, his executors, administrators, or assigns, under or by virtue of the powers or authorities herein contained."

In the year 1838 the *Neath Abbey* estate was held as to one undivided third by the then Lord *Dynevor* in fee, as to another third by *Henry Combe Compton* in fee, and as to the remaining third by trustees, called the *Dynevor* trustees, with power of partition (Lord *Dynevor* being equitable tenant for life). By a deed of partition dated July, 1838, the *Neath Abbey* estate was conveyed (with the exception of mines and minerals, and with the exception of a part of the estate on which there were copper and iron works, and roads), to a releasee to uses, by reference to three schedules; as to the lands in the first schedule, to the use of Lord *Dynevor* in fee, as to the lands in the second schedule, to the use of *Henry Combe Compton* in fee, and as to the lands in the third schedule, to the use of the *Dynevor* trustees.

The second schedule comprised a portion of the canal at an apportioned rent, and a part of the property away from the canal. The portion of the canal comprised in the second schedule abutted for its whole length on one side on lands comprised in the first schedule, on the other side on lands partly comprised in the first schedule, and partly comprised in the third schedule.

By indentures of lease and release dated March, 1839, *Henry Combe Compton* conveyed to *Henry* and *Charles Tennant*, the then lessees of the canal, certain portions of the lands comprised in the

second schedule to the deed of partition of 1838, including that part of the canal which was comprised in the second schedule.

The Plaintiff, the present Lord *Dynevor*, was tenant for life of the lands comprised in the first and third schedules of the deed of partition of 1838. The Defendant was *Gertrude Barbara Rich Tennant*, the present owner of the canal.

The Plaintiff had given notice of his intention to build a bridge over that part of the canal which was comprised in the second schedule to the deed of partition. The Defendant disputed his right to build the bridge. The Plaintiff claimed a declaration of his title as owner of the lands comprised in the first and third schedules of the deed of partition to use the land demised by the deed of 1820 intersecting or abutting on his own land, according to the proviso above set out, and an injunction to restrain the Defendant from interfering with his so doing.

This was the trial of the action.

*Cozens-Hardy*, Q.C., and *Edward Bray*, for the Plaintiff:—

The proviso in the lease which the Plaintiff is now seeking to enforce operated by way of re-grant to the then owners of the *Neath Abbey* estate of an easement over the land comprised in the lease; the right created by the proviso was not an incident to the reversion: *Newcomen* v. *Coulson* (1).

On partition of the dominant tenement the easement continued to exist in respect of every part of the land severed: *Rowbotham* v. *Wilson* (2).

Supposing, however, that on the destruction of the term by merger, the easement was also destroyed as a legal right, the Plaintiff is still entitled in equity, for the lessees stood in a fiduciary position, to that extent, to the owners of the several parts of the dominant tenement, so that they had no right to put an end by their own act to that easement which the original lessee had for value created: in the same way that a lessee will not be allowed by surrendering to injure his sub-lessee or the purchaser of fixtures: *Mellor* v. *Watkins* (3); *Saint* v. *Pilley* (4). Neither could *Compton* on his part destroy the easement in the other

(1) 5 Ch. D. 133.
(2) 8 H. L. C. 348.
(3) Law Rep. 9 Q. B. 400.
(4) Ibid. 10 Ex. 137.

PEARSON, J. owners of the severed lands, for that would be to derogate from his own grant.

1886

LORD DYNEVOR v. TENNANT.

*Cookson*, Q.C., and *Edward Beaumont*, for the Defendant:—

The right of making roads over the canal was reserved to the grantors of the lease as such, and was an incident to the reversion, and was entirely vested in *Compton* by the partition deed. At most it was a right that could endure only so long as the lease endured. *Compton* was not in any way fettered by the partition deed from dealing with his reversion in the land how he pleased, and there was no equity either against him or against the lessees from granting or accepting the reversion.

*Bray*, in reply.

PEARSON, J.:—

In the year 1820 Lord *Dynevor*, *Henry Combe Compton*, and *Sarah Doyley* were the owners of certain lands which it will be convenient to call the *Neath Abbey* estate.

At that time a certain person of the name of *Tennant* was desirous of making a canal across those lands, and thereupon an agreement was come to between Mr. *Tennant* and the three owners of the land, under which sufficient land to enable Mr. *Tennant* to make the canal was demised to him for the term of 1000 years, and in that deed was contained a proviso that although that canal was made, nothing whatever contained in the lease should prevent or hinder the owners, their heirs or assigns, from making (to express it shortly) roads across or over the canal, provided they did no injury and caused no interruption to the traffic on the canal.

Now, although there have been several questions raised in this case as to whether that was a re-grant of the right, I shall assume, for the purpose of my judgment, in favour of the Plaintiff in this case, that that was a good re-grant to the three co-owners of the land, their heirs and assigns, of the right to make those roads, including of course the bridges over the canal, and that during the term of 1000 years if the co-owners or any one co-owner had remained entitled to the reversion, and the term had continued

to exist, the right created by that re-grant would have existed, and that they, or the persons claiming under or through them, might have exercised that right. One thing, however, is clear, and that is this, that Mr. *Tennant*, who had no right whatever in the lands except under the lease, could only grant that right so long as the lease existed, and that whenever that lease came properly to an end, whether by effluxion of time or by any other due process of law, that right would cease and must necessarily come to an end. Accordingly, to put one example, if five years after that lease had been granted the co-owners, existing exactly as they did at the time when the lease was granted, agreed with Mr. *Tennant* to accept a surrender of his lease, the surrender being made, everything in the lease would have gone, and there would have been no easement of any sort or description existing with regard to the canal. The property would then have been the property of the co-owners freed and discharged from the lease and everything contained in it, and they would have been entitled to deal with it exactly as they pleased. That proposition, I think, cannot be disputed. Then what happened was this: The canal was made by Mr. *Tennant*, and the canal being made nothing further appears to have been done until the year 1838, and in 1838 the co-owners were minded to make a partition between themselves of the lands to which they were entitled at that time in undivided thirds and which included this *Neath Abbey* estate, and making that partition, the partition was made in the ordinary form; that is to say, all the parties entitled at that time to the *Neath Abbey* estate joined in conveying to a releasee for uses all the lands of which partition was to be made, and in so doing they used necessarily the most proper and general words, and conveyed to the releasee for uses all the lands, with all ways, easements, rights, and appurtenances. I say, "necessarily the most proper," because the intention was to convey the thing of which partition was intended to be made to the releasee for uses, so that the partition should then be made between the three persons who were then entitled, and allotting to those three persons so much of the land, and interests in the land, as was an equal share, so that they might each take their one share in severalty. When that partition was made Lord *Dynevor* was

PEARSON, J. 1886 LORD DYNEVOR v. TENNANT.

allotted certain lands adjoining the canal along part of its course. But the canal, that is, the soil of it and the towing-path, was conveyed to Mr. *Compton*. Why or wherefore I know not, but so it was. Conveyance was made in the ordinary way by schedules, the releasee for uses being declared to stand possessed of the land in the first schedule to the use of Lord *Dynevor*. I am not giving all the limitations. The land in the second schedule to the use of Mr. *Compton*, and the land in the third schedule to the use of the people who were then entitled. So matters stood in 1838, and so matters continued until somewhere about the present year, or I should rather say last year—1885. Last year Lord *Dynevor* proposed to make a bridge over the canal where it intersected portions of his land which had been allotted to him, and the *Dynevor* trustees. Upon his proposing to do that, the present owner of the canal objected that he had no right whatever to do so, on the ground that the Defendant's predecessors bought from Mr. *Compton* the reversion in that part of the canal which intersects Lord *Dynevor's* estate at the point where he proposed to make the bridge, and the Defendant says that that being so, the lease is gone, and that all the rights created by the lease are gone, and Lord *Dynevor* would simply be a trespasser if he made the bridge over the canal. The question is whether the Plaintiff, or whether the Defendant, is right in this contention.

Now it seemed to me at a very early stage of the discussion that that must depend entirely upon the partition deed, and I remain of the same opinion still. I think the question is whether or not under the partition deed Mr. *Compton* became the absolute owner of the reversion in that part of the canal, or whether he can be said to have taken it simply with a trust to preserve the rights—at all events until the effluxion of the lease, or until the lease has been dealt with with the consent of Lord *Dynevor* or those who may hereafter represent him—of the land adjacent to this part of the canal. If he took the estate in the canal which was allotted to him as absolute owner in fee simple, I can see no reason why he should not deal with the reversion as the co-owners might have dealt with it in the year 1820. No doubt it has been argued that in order to create an easement there must be a dominant and a servient tenement, and it has been argued further

that as long as that dominant and servient tenement remain physically in existence that easement must remain also. But that is not so at all. The easement depends entirely for its existence on the grant which creates it, and if the grant which creates it creates it only for a certain duration, when that time has elapsed the grant is gone. If, again, the grant is created under a lease, the persons who are absolutely the lords and masters of the lease are the reversioners for the time being, and the lessees also for the time being, and the reversioners for the time being, and the lessees for the time being, may deal with that lease as they please, and may put an end to it when they please, and unless there be some equity in a third person to keep it alive they may deal with it so as to destroy it without any consent or acquiescence on the part of those who are no longer either reversioners or lessees. Now, if after 1820 the three then co-owners had been pleased to convey the whole of this canal comprised in the lease to one of themselves, that one of themselves would have been the reversioner under that lease, and that one person taking the place of the three co-owners might have dealt with that lease as he pleased, unless he had come under terms with his co-owners that he would preserve any rights which they had before for their benefit, and, to my mind, the only question is this: When this part of the canal was allotted to Mr. *Compton* in 1838, did he by implication, or did he in terms, undertake that he would do no act which should interfere with the existence of the lease so as to preserve alive all the rights which the lessee had granted to the original reversioners? To my mind it is impossible to spell out any such contract under the deed of partition. Now, with regard to the severed lands, as I have said before, any easement which they had depended upon the duration of the lease, and must necessarily come to an end with the termination of that lease. This reversion was conveyed to Mr. *Compton*. Mr. *Compton* has been minded to sell that reversion to the tenant, and selling that reversion to the tenant, and the tenant getting the reversion as well as having in his own possession the lease, the lease of that portion has come to an end, and has come to an end by the act of that person who had a right to put an end to it, for Mr. *Compton*, being by the act of his co-owners the sole rever-

PEARSON, J. 1886 LORD DYNEVOR v. TENNANT.

sioner of that lease, had, unless he was restricted by the deed of partition, the right to deal with it as he pleased. Is he or is he not restricted by the deed of partition? In terms, certainly not. There is not a single syllable in the deed of partition which clothes Mr. *Compton* with the nature or quality of a trustee for them with regard to this lease. Then it is said that he cannot derogate from his own grant, and that he does derogate from his own grant if he conveys the reversion so as to put an end to the lease, because he takes away certain rights, ways, and easements which attach to other parts of the property by virtue of the reversion being in the co-owners before. It would have been exactly the same thing if, instead of this being a canal, a piece of land intersecting Lord *Dynevor's* property had been allotted to Mr. *Compton*, and if that had been allotted to Mr. *Compton* it is impossible to say that because it intersected Lord *Dynevor's* land, that under a deed of partition Mr. *Compton* was obliged to give to Lord *Dynevor* the same right of passing over that piece of land which all the co-owners had possessed before. That contention, to my mind, is absolutely impossible, and when I look to the deed of partition I think the intention of all parties was to vest absolutely in Mr. *Compton* the reversion of this part of the canal, as the reversion of another part of the canal was vested in Lord *Dynevor*. There is no contract whatever on the part of Mr. *Compton* to keep alive this lease. There is no contract on the part of Mr. *Compton* that when the lease should come to an end he should give to Lord *Dynevor*, or those who took the lands, the right of passage across the canal or across the soil of the canal if the canal itself should be put an end to.

Under those circumstances I think Lord *Dynevor* is entirely wrong in supposing that he has the rights he now claims. I think that the lease coming to an end the easement comes to an end whether under a regrant or otherwise, and, under those circumstances, all I can do is to dismiss the action.

Solicitors for Plaintiff: *Warrens.*

Solicitors for Defendant: *Finch, Jennings & Finch.*

D. P.

PEARSON, J.

1886

*April* 5.

## *In re* ALFORD.

## HUNT *v.* PARRY.

[1881. A. 1214.]

*Accumulation—Maintenance—Jurisdiction to allow Maintenance to Tenant for Life notwithstanding prior Trust for Accumulation of whole Income during a Term of Years.*

Where a testator has by his will made a settlement of his estate, subject to a prior trust for the accumulation of the whole income during a term of years not exceeding the legal limit, the Court has, in the absence of special circumstances, no jurisdiction to order an allowance to be paid out of the income for the maintenance and education of the person who will, if he is living at the end of the term, be the tenant for life, even if there is no other way in which a provision can be made for his maintenance and education.

*Havelock* v. *Havelock* (1) distinguished.

A testator devised his real estate to trustees for a term of twenty years after his death, and, after the expiration of the term, and in the meantime subject thereto, to the use of the Plaintiff for life, with remainder to the use of his first and other sons successively in tail, with remainders over. Under the trusts of the term the rents were to be accumulated for a period of twenty years after the testator's death. The income of the testator's residuary personalty was subject to a similar trust. At the end of the twenty years the residuary personalty and the accumulations of the income and of the rents were to be laid out in the purchase of real estate, which was limited to the same uses. The will contained no provision for the maintenance of the Plaintiff during the term. He was not the heir-at-law of the testator, but he was the eldest son of a favourite niece of the testator, who had before her marriage lived a good deal with him and had been educated at his expense. The testator was a tenant farmer. The rental of his real estate was about £440 per annum; his personal estate was about £10,000. An order had been made in the action allowing £300 a year for the maintenance and education of the Plaintiff during his minority. After he had attained twenty-one the Plaintiff applied for the continuance of the allowance until further order:—

*Held*, that, there being no special circumstances, there was no jurisdiction to interfere any further with the trust for accumulation.

THIS action was brought for the administration of the real and personal estate of *J. G. Alford*, who died on the 13th of January, 1879.

(1) 17 Ch. D. 807.

PEARSON, J. 1886 *In re* ALFORD. HUNT *v.* PARRY.

By his will, dated the 19th of March, 1878, the testator bequeathed to *R. H. Woodhouse*, *T. C. Parry*, and *W. Daggs*, whom he appointed trustees and executors of his will, a sum of £3000, upon trust for investment, and to pay the income thereof to his niece, *Anne Elizabeth Hunt*, the wife of *T. O. Hunt*, for her separate use during her life, or until she should become bankrupt, or until certain other events should happen, and, after the failure or determination of those trusts, if the same should fail or determine in her lifetime, to pay or apply the income for the maintenance or personal support of Mrs. *Hunt* and of her child or children, or their issue, other than an eldest or only son; and after her death the trustees should stand possessed of the £3000 and the income thereof, in trust for all or any of the child or children of Mrs. *Hunt* living at the testator's death, or born afterwards, who should attain twenty-one or marry as therein mentioned, other than and except the first son of Mrs. *Hunt* who should attain twenty-one. And if there should be no such child of Mrs. *Hunt*, then, subject and without prejudice to the trusts thereinbefore declared, and after her death and such default or failure of her children (which should last happen), the trustees were to stand possessed of the £3000 and the income thereof, upon the trusts thereinafter declared concerning the proceeds of the sale of the testator's residuary personal estate. And the testator bequeathed the residue of his personal estate to the same trustees, on trusts for sale and conversion and investment, and upon further trust, during a term of twenty years after his death, to accumulate the income, and, after the expiration of the twenty years, to stand possessed of the investments and the accumulations upon the trusts thereinafter declared. And the testator devised certain real estate mentioned in the will, and all other his real estate, to the same trustees, their executors, administrators, and assigns, for the same term of twenty years, and after the expiration thereof, and in the meantime subject thereto and to the trusts thereof, to the use of the Plaintiff, the eldest son of Mrs. *Hunt*, and his assigns, during his life, without impeachment of waste, with remainder to the use of his first and every other son successively in tail, with remainders over in strict settlement. The trusts of the term of twenty years in the real estates were for the management of the

estates and the accumulation of the surplus rents (after payment of expenses of management), in the same way as the income of the proceeds of sale of the residuary personalty. At the end of the twenty years the trustees were to hold the residuary personal estate with the accumulations, and the accumulations of the rents of the real estate, upon trust to invest the same in the purchase of land, to be limited to the same uses as the original real estate. And the testator directed that his trustees should purchase the farm which he occupied, in case it should be for sale before the expiration of the term of twenty years.

The Plaintiff was an infant at the time of the testator's death, and the will contained no provision for his maintenance during his minority. The action was brought by the Plaintiff, by his father as his next friend. The Defendants were, the trustees of the will; other children of Mrs. *Hunt* who were entitled under the limitations in remainder of the real estate; and the testator's heiress-at-law.

Orders had been made in the action by Mr. Justice *Fry* for the payment of an allowance of £300 a year for the maintenance and education of the Plaintiff during his minority.

The Plaintiff attained twenty-one on the 2nd of January, 1886. He was desirous of qualifying himself for adopting the profession of a solicitor, and he took out a summons asking that the trustees might be at liberty, out of the testator's estate, to continue, until further order, to pay or apply the sum of £300 a year for his maintenance and education.

There was evidence that the father was unable to provide for the Plaintiff's education.

The Plaintiff's mother had before her marriage lived a good deal with her uncle (the testator) after the death of her father (which took place when she was about five years old), and the testator had paid for her education.

The testator was a tenant farmer. His real estate at the time of his death was of small value, but after his death his trustees, in accordance with the direction contained in his will, purchased the farm which he had occupied. The rental of the real estate after that purchase was made was about £440. The personal estate was worth about £10,000.

PEARSON, J. 1886 In re ALFORD. HUNT v. PARRY.

*Ingle Joyce*, for the summons :—

There being no provision for the maintenance and proper education of the Plaintiff, *Havelock* v. *Havelock* (1) is an authority for granting the application.

[PEARSON, J. :—In that case it was plain that the testator intended and expected that the devisee would live in and occupy the mansion-house, which he would not have been able to do if all the income of the property was taken from him. There is nothing to shew that this testator in his lifetime treated the Plaintiff as his heir.]

The testator paid for the education of the Plaintiff's mother. An allowance has already been made for the Plaintiff's maintenance and education during his minority. There is no reason why a hard and fast line should be drawn at twenty-one, the circumstances being the same. At any rate an allowance should be made to enable the Plaintiff to complete his education, until he is in a position to earn his own living.

*Stallard*, for the trustees :—

The trustees submit to whatever the Court shall think right. If this application is granted, the result will be that in every case the Court will set aside a trust for accumulation of income. There is no gift to the Plaintiff till after the expiration of the term of twenty years.

*Ingle Joyce*, in reply :—

The Plaintiff has a vested life estate. His life might be insured, and he could create a charge on the life estate and on the policy : *Re Arbuckle* (2) ; *Seton* on Decrees (3).

PEARSON, J. :—

I am strongly opposed to all these trusts for accumulation of income ; I think they are always more or less mischievous. At the same time they are legal. I do not see how I can help the Plaintiff. But I will not prevent his making in Chambers any

(1) 17 Ch. D. 807. (2) 14 W. R. 535.
(3) 4th Ed. vol. ii. p. 726.

application such as Mr. *Joyce* has suggested. According to my view these trusts for accumulation are always unjust, but I have no jurisdiction to set them aside. There have no doubt been cases in which, notwithstanding a trust for accumulation, the Court has seen its way to order a sum to be paid for the maintenance or education of the person who is to succeed to the property. But in all those cases, and notably in *Havelock* v. *Havelock* (1), there have been some special circumstances which have induced the Court to do this. In the present case the testator has made no provision for the maintenance of the Plaintiff during the term of twenty years, and he will derive no benefit from the gift to him unless he survives the twenty years, when the property may not be a tenth part so valuable to him as it would be now. The testator may have been capricious in what he has done, but he had a right to be capricious, and I can see no reason for setting aside what he has done. The income of the estate is but small, and the testator seems to have thought, perhaps erroneously, that he could by means of the accumulations create an estate to provide for an eldest son. I must allow the testator's folly to prevail. There may have been some reason for making an allowance for the Plaintiff's maintenance and education during his minority; I do not say that I should have made the order myself. But I leave Mr. Justice *Fry's* order untouched.

Solicitors: *T. Fortune; Twisden & Co.*

(1) 17 Ch. D. 807.

W. L. C.

PEARSON, J.

1886

*April* 5, 6, 15.

## *In re* CORNWALLIS.
## CORNWALLIS *v.* WYKEHAM-MARTIN.

[1885 C. 5735.]

*Forfeiture—Name and Arms Clause—Validity—Disentailing Deed, Effect of.*

A testatrix devised her real estate in strict settlement, the will containing an ordinary name and arms clause. And she bequeathed personal estate to trustees, in trust for the person or persons who for the time being should by virtue of the will be beneficially entitled to the real estate, for such or the like estates or interests, to the intent that the personal estate should go along with the real estate, so far as the nature of the personal estate and the rules of law and equity would permit. And the testatrix directed that the name and arms clause relating to the real estate should not affect the personal estate, but in lieu thereof she directed (*inter alia*) that if any person, being a male, who should be entitled under any of the limitations of the will to an absolute beneficial interest in possession by purchase in the personal estate should refuse or neglect to assume, use, and bear the name and arms of *C.* within the period therein mentioned, provided such period should expire within twenty-one years next after the death of the survivor of three persons named, or should, after having assumed the name and arms, discontinue to use and bear the same, or either of them, for six months at any time within the period of twenty-one years, then and in any of such cases, and from time to time, the estate and interest of the person so refusing, or neglecting, or discontinuing in the personal estate should absolutely cease, and the personal estate should from time to time go over to the person or persons who would have been entitled to the real estate under the limitations of the will in case the party whose estate should so cease, being tenant for life of the real estate, were dead, or, being tenant in tail of the real estate, were dead without issue, for such or the like estates or interests as such person or persons would have been entitled to in the real estate.

Within the proper time after the death of the testatrix the first tenant for life under the will assumed the name and arms of *C.*, and continued to use them until his death. The Plaintiff was his first son and the first tenant in tail of the real estate under the will. After he had attained twenty-one he executed a disentailing deed of the real estate and limited it to himself in fee simple. He then claimed to be indefeasibly entitled in possession to the personal estate :—

*Held*, that the forfeiture clause relating to the personal estate was valid, and that the effect of it was to make the interest of the tenant in tail, in case it should be forfeited, go over to the person who would have been entitled to the real estate under the limitations of the will in case the

tenant in tail had been dead without issue, and no disentailing deed had been executed:

*Held*, therefore, that the Plaintiff was not indefeasibly entitled to the personal estate; but that his interest was liable to forfeiture in case within the period of twenty-one years he should discontinue to use the name and arms of *C.*

THIS was an originating summons by *F. S. Wykeham Cornwallis*, as Plaintiff, against *Cornwallis Wykeham-Martin* and *E. H. Whitehead*, as Defendants, to determine whether the Plaintiff had become indefeasibly entitled to certain personal estate bequeathed by the will of Miss *Caroline Frances Cornwallis*, who died on the 8th of January, 1858. The Defendants were the trustees of the will.

By her will, dated the 1st of December, 1837, the testatrix devised her real estate to the use of trustees, their executors, administrators, and assigns, for a term of 100 years from the day of her decease, upon the trusts thereby declared concerning the same during the minority or respective minorities of every person entitled under the will as tenant for life or tenant in tail by purchase to the real estate in remainder immediately expectant on the term; and, subject thereto, to the use of *F. Wykeham-Martin* (the father of the Plaintiff) for his life, without impeachment of waste; with remainder to the use of the trustees, their executors and administrators, during the life of *F. Wykeham-Martin*, upon trust to preserve contingent remainders; with remainder to the use of his first and other sons successively in tail male; with remainders over. The will contained a name and arms clause in a common form, by which the testatrix required that every person for the time being legally or equitably entitled to the possession or receipt of the rents and profits of the real estate as tenant for life or tenant in tail, and the respective husbands of females so entitled, should assume and bear, and apply for and use his or her best endeavours to obtain Her Majesty's royal license to take and use, the surname and arms of *Cornwallis*, or should forfeit his or her estate under the will. The testatrix appointed protectors of the settlement created by her will, and she thereby earnestly requested and intreated the protectors and protector for the time being to exercise the discretion vested in them or him by the statute for the abolition of fines

PEARSON, J. 1886 *In re* CORNWALLIS. CORNWALLIS *v.* WYKEHAM-MARTIN.

and recoveries by refusing to consent to any assurance by any tenant in tail under the will which might have the effect of defeating her anxious intention and desire that the person or persons for the time being entitled to her devised estates should use and bear the name and arms of *Cornwallis* in the manner hereinbefore provided. And the testatrix bequeathed to the trustees, their executors, administrators, and assigns, certain personal estate, upon trust for investment as therein mentioned. And she directed that the trustees should stand possessed thereof "in trust for the person or persons who for the time being shall by virtue of this my will be beneficially entitled to my real estates hereinbefore devised and limited to the uses and in the manner hereinbefore declared and mentioned, for such or the like estates or interests as such person or persons shall then have or be entitled to in my said real estates, to the intent that my said personal estate and effects may go along with my said real estates and be held and enjoyed by the person or persons who for the time being shall be entitled to the freehold of the same, so far as the nature of such personal estate and the rules of law and equity will permit. Provided always, and I do hereby will and direct, that the proviso for forfeiture herein contained as to my real estates shall not attach upon my said personal estate, but, in lieu thereof, I do hereby will and direct that, if any person being a male or unmarried female who shall be beneficially entitled, either under this proviso or any other of the limitations herein contained as tenant for life in possession, to the dividends, interest, and annual proceeds of my said personal estate, or the husband of any female who shall be so entitled, shall refuse or neglect to assume, use, and bear such surname and arms as are hereinbefore required in the case of parties entitled to my real estates in manner hereinbefore mentioned, within the period next hereinafter mentioned as applicable to his or her case (that is to say) as to every such husband within twelve calendar months next after the solemnization of his marriage, or after his wife, or any person claiming under him or her, shall have become actually entitled in possession to such dividends, interest, and annual proceeds (which shall last happen), and as to every such male and unmarried female within twelve calendar months next after

he or she, or any person claiming under him or her, shall have become entitled in possession to such dividends, interest, and annual proceeds, or after he or she shall have attained the age of twenty-one years (which shall last happen), or shall refuse or neglect to apply for such license to assume, use, and bear such name and arms as aforesaid within such period or respective periods as aforesaid, or shall after having assumed such name and arms discontinue to use and bear the same or either of them for six calendar months, or being a male shall become heir of the body of *Charles Wykeham-Martin*, or if any person being a male or unmarried female who shall be entitled under this present proviso, or any other limitation herein contained, to an absolute beneficial interest in possession by purchase in my said personal estate, or the husband of any female who shall be so entitled, shall refuse or neglect to assume, use, and bear such name and arms aforesaid within such of the respective periods next hereinafter mentioned as shall be applicable to his or her case (that is to say) as to every such husband within twelve calendar months next after the solemnization of his marriage or after his wife or any person claiming under him or her shall have become actually entitled in possession to my said personal estate and effects (which shall last happen), and as to every such male or unmarried female within twelve calendar months next after he or she, or any person claiming under him or her, shall have become entitled in possession to my said personal estate, or after he or she shall have attained the age of twenty-one years (which shall last happen), provided such periods shall expire within twenty-one years next after the decease of the survivor of them the said *F. Wykeham-Martin, Cornwallis Wykeham-Martin,* and *Philip Wykeham-Martin,* or shall refuse or neglect to apply for such license as aforesaid within the same period, or shall, after having assumed the said name and arms, discontinue to use and bear the same, or either of them, for the space of six calendar months at any time within the period of twenty-one years next after the decease of the survivor of them the said *F. Wykeham-Martin, C. Wykeham-Martin,* and *P. Wykeham-Martin,* or being a male shall within such period of twenty-one years become heir of the body

PEARSON,J. 1886 *In re* CORNWALLIS. CORNWALLIS *v.* WYKEHAM-MARTIN.

of the said *C. Wykeham-Martin*, then and in any of such cases, and from time to time when and so often as the same shall happen, the estate and interest of the person, or of the wife of the person, so refusing, or neglecting, or discontinuing, or becoming heir of the body as aforesaid, in my said personal estate, shall absolutely cease and determine, and my said personal estate shall from time to time go over and belong to the person or persons who would have been entitled to my said real estates under the limitations herein contained in case the party whose estate shall so cease and determine, being tenant for life of my said real estates, were dead, or being tenant in tail of my said real estates, were dead without issue, for such or the like estates or interests as such person or persons would have been entitled to in my said real estates."

In 1859, within the proper time after the death of the testatrix, the Plaintiff's father, *F. Wykeham-Martin*, assumed, by royal license, the name and arms of *Cornwallis* instead of the name and arms of *Wykeham-Martin*, and he continued to use and bear the name and arms of *Cornwallis* until his death. He died on the 23rd of April, 1867. The Plaintiff, who was his first son, was born on the 27th of May, 1864. The Plaintiff was not the heir of the body of *C. Wykeham-Martin*. After the Plaintiff had attained twenty-one, he executed a disentailing deed of the real estates of which he had become tenant in tail in possession under the will of the testatrix, by which deed those estates were limited to the use of the Plaintiff in fee.

The summons asked for a declaration that, according to the true construction of the will, and in the events which had happened, the Plaintiff acquired an equitable estate in tail male, or *quasi* tail male, in possession in the personal estate settled by the will, and that he had under the disentailing deed become indefeasibly entitled in possession to all such settled personal estate, and that the Defendants might transfer the same to him accordingly.

*T. C. Wright*, for the Plaintiff:—

The disentailing deed has put an end to the operation of the name and arms clause which applies to the personal estate. The

personal estate was intended to go with the real estates, and there is now no person who is or can be tenant for life or in tail of the real estates; there is only a person entitled in fee. Therefore the forfeiture under the clause relating to the personal estate cannot take effect. The real estates having been disentailed, the Plaintiff is absolutely entitled to the personalty.

*M. George Davidson*, for the Trustees:—

The testatrix clearly intended that the name and arms of *Cornwallis* should be used by the persons who took the real estates for as long a period as she could legally secure their doing so. No doubt the personal estate is given absolutely to the Plaintiff in the first instance. But the name and arms clause makes an express exception, and the only question is whether the forfeiture is enforced by a proper gift over. An absolute gift of personalty can be qualified in this way, if the rule against perpetuities is not infringed, which it is not in the present case. *Re Catt's Trusts* (1) shews that the gift over is a good one, because it fits the condition. The object of the separate name and arms clause as to the personalty was to prevent the operation of a disentailing deed of the real estates, and it meets the identical case which has happened. The gift over in the event of a forfeiture is, not to the person who is entitled to the real estates, but to the person who would have been entitled to them under the limitations of the will; *i.e.*, not the limitations of the will as varied by a disentailing deed, but the limitations as they originally stood before the execution of a disentailing deed. In this particular case there is an exception from the general intention of the testatrix that the realty and the personalty should go together.

*T. C. Wright*, in reply:—

The effect of the argument on the other side is entirely to set aside the intention of the testatrix that the realty and the personalty shall go together. The disentailing deed did not separate them. A disentailing deed does not destroy the interest of the tenant in tail, it only renders it perpetual: *Lord Lilford* v. *Attorney-General* (2).

(1) 2 H. & M. 46.

(2) Law Rep. 2 H. L. 63.

PEARSON, J. 1886

*In re* CORNWALLIS. CORNWALLIS *v.* WYKEHAM-MARTIN.

1886. April 15. PEARSON, J. (after stating the facts, continued):—

The question is, whether the name and arms clause, which relates to the personal estate of the testatrix, is valid, and, if it is valid, what is the proper construction of it? Under the original gift of the personal estate the Plaintiff would now be absolutely entitled to it. But then comes the name and arms clause. The first observation to be made upon that clause is, that the period within which any person who takes the personal estate must acquire an absolute interest is within the period allowed by the law; the clause does not infringe the rule against perpetuities. Within twenty-one years after the death of the testatrix there must be some person who will be entitled to an absolute interest in the personalty. Then, if any person who has taken the personalty under the gift discontinues the use of the name and arms of *Cornwallis*, to whom will the property go under the forfeiture clause? for, as was laid down in *Re Catt's Trusts* (1), the defeasance must "fit" the condition. If the forfeiture clause does not provide for the contingency which has actually happened the clause will be void. That was the ground of the decision of *Wood*, V.-C., in *In re Catt's Trusts*, and at first I was inclined to think that the present forfeiture clause sinned against this rule. It seemed to me that a tenant in tail of the real estates might have barred the entail, and might have then become owner in fee of the estates, and that, though he might be dead without issue, the personal estate would not go over under the forfeiture clause. But, after carefully considering the clause, I think the meaning of it is, that the property is to go over in the same way as if the tenant in tail, not having barred the entail, had died without issue. I think the testatrix has, so to say, selected a *persona designata* to whom the personal estate is to go over, *i.e.*, the person who, if the limitations of the will had been undisturbed by any disentailing deed, would have been the next in succession to take the real estates. I am confirmed in this view by the decision of the House of Lords in *Potts* v. *Potts* (2), and that of Lord *Romilly*, M.R., in *Hogg* v. *Jones* (3). But I wish to guard myself

(1) 2 H. & M. 46.

(2) 1 H. L. C. 671.

(3) 32 Beav. 47.

from saying that I agree with everything which Lord *Romilly* said in the latter case. My decision, however, does not conflict with his. I dismiss the summons with costs.

Solicitors for Plaintiff: *Meynell & Pemberton.*
Solicitors for Trustees: *Davidson, Burch, & Co.*

W. L. C.

---

## *In re* HARRISON. LATIMER *v.* HARRISON.



[1880 H. 2055.]

*Executor—Retainer—Administration—Receiver.*

An executor proved in a creditor's action for £115 due to him by his testator: on the appointment of a receiver he handed over assets to a larger amount than £115 to the receiver: he afterwards paid a creditor £700, for which he was surety, and interest:—

*Held*, that the executor had priority in respect of the £115, and was entitled only to stand in the place of the original creditor in respect of the £700 without interest.

THIS was a creditor's action to administer the estate of *Joseph Harrison*, deceased. The estate was insolvent. The Defendants were the executrix and the two executors of the will of the deceased. The testator died in June, 1880. The executors proved his will. The administration action was commenced shortly afterwards, and subsequently a receiver and manager was appointed. The assets had been got in and were represented by a sum of about £1800 in Court, and the Chief Clerk had certified what the debts of the testator were.

*Thornton Harrison*, one of the Defendants, took out a summons that he might be paid out of the funds in Court in priority of the costs and the debts of other creditors a sum of £989 5*s.* 10*d.*, on the ground that he was entitled to such priority by virtue of the executor's right of retainer.

The amount claimed was made up of a sum of £115 5*s.* 10*d.* due to the claimant from the testator at the time of his death, a sum of £700 for which the claimant had been surety for the

PEARSON, J.

1886

*In re* HARRISON. LATIMER *v.* HARRISON.

testator on a joint and several promissory note, and interest on the latter sum to the amount of £174.

The claimant had proved for the £115 5*s.* 10*d.* It appeared that previously to the appointment of the receiver he had had in his hands assets of the testator to a larger amount, which he had afterwards paid to the receiver. The holder of the promissory note had proved for a debt including the £700 secured by the promissory note. The claimant had recently since the appointment of the receiver paid to the holder of the note the principal sum of £700, and interest to the amount of £174.

The summons was now heard.

*Lambert*, for *Thornton Harrison*:—

There is no doubt that the executor is entitled to retain against the other creditors anything that comes into his hands or is paid into Court previously to the appointment of a receiver: *In re Compton* (1); *Richmond* v. *White* (2). In *In re Jones* (3) Mr. Justice *Kay* reluctantly held that the appointment of a receiver does stop the right; the previous authorities hardly bear out that decision. There is no reason why the appointment of a receiver should affect the right. The reason an executor is allowed a right of retainer is, that he cannot pursue the remedies of another creditor: *Talbot* v. *Frere* (4); the existence of an administration action does not affect the right, therefore the mere appointment of a receiver ought not to affect it.

The claimant certainly did not lose his right to retain out of assets in his hands by paying them over to the receiver, for he could not refuse to do so: *Davenport* v. *Moss* (5).

*Swinfen Eady*, for the executrix and other executor.

*Brooksbank*, for the Plaintiff:—

As to the £700 and interest, the executor clearly has no right to retain. This debt was created long after all assets left his hands, when the assets were ready for distribution. The authori-

(1) 30 Ch. D. 15.
(2) 12 Ch. D. 361.
(3) 31 Ch. D. 440.
(4) 9 Ch. D. 568.
(5) 14 W. R. 453.

ties shew that in no case after the appointment of a receiver will the executor be allowed to retain anything in respect of a debt not then existing, or out of assets afterwards got in. And in some cases the executors will not be allowed to retain money got in before the receiver is actually appointed: *In re Birt* (1).

With regard to the £115 5*s.* 10*d.*, the executor by delay and conduct in not insisting earlier on his right and electing to prove instead of retain has lost his right: *Player* v. *Foxhall* (2); *Ex parte Campbell* (3).

*Lambert* in reply.

1886. April 17. PEARSON, J.:—

With respect to the £115, it was a debt due at the time of the death of the testator. After a receiver was appointed I consider it decided by the authorities, that if assets are collected by the receiver, there is no right of retainer. But it appears that before the receiver was appointed the executor had received assets, which he afterwards paid over to the receiver. I think the executor had a right of retainer when the assets came to his hands, and that right is not lost by the simple fact that the money was paid to the receiver. With respect to the sum of £115 5*s.* 10*d.*, I must allow the retainer.

The other debt is of a different nature. The executor had become surety for the testator on a promissory note. At the time of the testator's death he had not been called on to pay anything in respect of the suretyship. Nothing, therefore, was due to him in respect of the suretyship. Some years after the death of the testator he was called upon to pay, or at all events he did pay, the sum secured on the note and interest. At the time he paid that sum there was no money in his hands. No money came to his hands which he could possibly retain. I hold, therefore, in respect of that debt, that he had no right of retainer. The right being capable only of being exercised against assets which come into the hands of an executor, he is at liberty therefore to stand

(1) 22 Ch. D. 604.
(2) 1 Russ. 538.
(3) 16 Ch. D. 198.

PEARSON, J. 1886 *In re* HARRISON. LATIMER *v.* HARRISON.

as creditor in respect of the principal money. But he cannot make any claim for interest, inasmuch as the estate is insolvent. He can only stand in the place of the creditor he has paid. Costs will be costs in the action.

Solicitors: *Tyas & Huntington*, agents for *R. T. Richardson, Barnard Castle; Adam Burn & Son.*

D. P.

## WILLIAMSON *v.* NORTH STAFFORDSHIRE RAILWAY COMPANY.

C. A. 1886 April 16.

[1883 W. 1632.]

*Costs—Higher and Lower Scale—Rules of Supreme Court*, 1883, *Order* LXV., *r.* 9.

An action for the establishment of a right of great pecuniary value, and involving difficult questions of fact and law, was heard at great length on five days before *Bacon*, V.C., who gave judgment in favour of the Plaintiff. The principal Defendant appealed. The appeal was argued on four days and judgment reserved. Ultimately, the decision was reversed, and the action dismissed with costs, *Fry*, L.J., dissenting.

*Held*, that, although the case was important and difficult, the Court could not say that there were special grounds arising out of its importance and difficulty which would warrant giving costs on the higher scale.

MR. *SNEYD*, a considerable landowner in *Staffordshire*, constructed a railway upon his own estate. By the *North Staffordshire Railway* (*New Works*) *Act*, 1864, the *North Staffordshire Railway Company* were empowered to accept a lease of this railway. This Act incorporated the *Railways Clauses Consolidation Act*, 1845. The company, by arrangement with Mr. *Sneyd*, entered into possession of the railway in the same year, and on the 21st of July, 1869, he granted them a lease for 999 years. The Plaintiff was the owner of a considerable estate which adjoined Mr. *Sneyd's* estate, and, as he alleged, adjoined for a short distance the line of railway, and he was desirous in 1883 of availing himself of the right given by the *Railways Clauses Act*, 1845, s. 76, of having a siding or branch railway from the mines on his estate to communicate with the above-mentioned railway. Permission to make this siding being refused, the Plaintiff commenced this action against the company and Mr. *Sneyd*, the successor in title to the lessor, to have it declared that the Plaintiff as an adjoining owner was entitled to require the company to effect the communication, and to have *Sneyd* restrained from preventing it. The case made by Mr. *Sneyd* was that the Plaintiff was not an adjoining owner, for that the lease to the railway company did not include any land adjoining the Plaintiff's land,

C. A. 1886 — WILLIAMSON v. NORTH STAFFORDSHIRE RAILWAY CO.

but that a narrow strip adjoining the Plaintiff's land had been retained by the lessor. This was disputed by the Plaintiff, who alleged that the fence of the railway had been laid down so as to cut off a small piece of his land, and that the demise included the land up to this fence. He further alleged that, if the land up to this fence was not included in the demise, the company had been in possession of it ever since 1864, and had acquired a title under the *Statute of Limitations*, so that, in any event, the Plaintiff was an adjoining landowner. The boundaries between the two estates not having been kept up very distinctly about the spot, there was great difficulty in ascertaining upon the ground what the limits of the demised property were. A great deal of evidence was entered into on this subject, and also on the question of the extent of the property of which the company had been in possession. The case was admittedly of very great importance in a pecuniary point of view—the right of having a siding being of great value. The action was tried by Vice-Chancellor *Bacon* on five days in June, 1885. His Lordship came to the conclusion that the company had from 1864 been in possession of land adjoining the Plaintiff's boundary, and that, whether it was included in the lease or not, the company were now entitled to it, so as to make the Plaintiff an adjoining proprietor. His Lordship accordingly made a decree declaring the Plaintiff entitled to have a siding, and granted a perpetual injunction as asked. *Sneyd* was ordered to pay the Plaintiff's costs, and no order was made as to the costs of the company. *Sneyd* appealed, and the appeal was argued at great length on the 19th, 20th, 22nd and 23rd of March, 1886, an elaborate discussion taking place as to the effect of encroachments by a tenant on his landlord's property. Judgment was reserved.

Sir *H. Davey*, S.G., *Marten*, Q.C., and *Eyre*, appeared for the Appellant.

*Jelf*, Q.C., *Rigby*, Q.C., and *Ingle Joyce*, for the Plaintiff, and

*Hemming*, Q.C., and *Farwell*, for the company.

On the 16th of April the appeal was allowed with costs, and the action dismissed with costs, Lord Justices *Cotton* and *Bowen* being of opinion that the lease did not purport to demise land up

to the Plaintiff's land, but that a strip had been retained by the lessor, and that the company had not had any such possession of this strip as would give them a title to it under the *Statute of Limitations*. Lord Justice *Fry* dissented, being of opinion that on the true construction of the lease, and on the evidence in the case, the property which it purported to demise extended up to the Plaintiff's land.

Sir *H. Davey*, S.G., for the Appellant:—

I ask that the costs may be taxed on the higher scale on the ground that the case is one of difficulty and importance. Order LXV., rule 9, provides that costs on the higher scale may be allowed "if on special grounds arising out of the nature and importance, or the difficulty or urgency of the case" the Court or Judge shall so order.

[FRY, L.J.:—The rule does not say "on the ground of the importance and difficulty" of the case, but on "special grounds arising out of the nature and importance, &c."]

It has been usual in a serious action to allow costs on the higher scale.

[BOWEN, L.J.:—This is an important question, and I believe there has been a difference in practice between the Common Law and the Chancery Divisions. On the common law side it has been almost impossible to get costs on the higher scale. I remember a very complicated and difficult case, in which the Duke of *Norfolk* was a party, which involved questions of law, and the Court refused costs on the higher scale. The rule seems to have been intended to assimilate the practice of the two Divisions.]

Before the *Judicature Act* the question whether the costs were on the higher or lower scale depended on the amount in dispute, subject to the discretion of the Judge to give them according to the higher scale on special application where the amount in dispute was below the limit. The existing rule makes a special application necessary in every case, and the grounds are to be special grounds arising out of the importance and difficulty of the case.

[FRY, L.J.:—What are the special grounds here?]

That the case is one of great importance and difficulty.

C. A. 1886 WILLIAMSON v. NORTH STAFFORDSHIRE RAILWAY CO.

[FRY, L.J.:—I agree that it is—but is that a "special ground"?]

The words of the order are not as clear as might be, but it is difficult to understand them as meaning anything more than that the case is one of importance and difficulty.

[COTTON, L.J.:—Why should costs be taxed on a higher scale in a difficult case than in an easy one?]

In *Lydney and Wigpool Iron Ore Company* v. *Bird* (1), Mr. Justice *Pearson* expressed an opinion that costs on the higher scale were to be allowed where witnesses were properly examined in Court, and a long time was necessarily occupied in argument.

[FRY, L.J.:—I should be sorry to introduce a rule making the costs depend on the length of the argument.]

The object of the rule probably was to prevent one party running the other into heavy expense in a case which was not important or difficult, and to indemnify the successful party in a serious litigation on a difficult point. In *In re Chaytor's Settled Estate Act* (2) costs on the higher scale were allowed.

COTTON, L.J.:—

Although this case is one of importance and of extreme difficulty I do not think that there are in it special grounds arising out of the nature and importance or the difficulty or urgency of the case. I have great difficulty in understanding the meaning of the rule, and it is not necessary for us to determine its construction, but I think that in the present case, though important and difficult, there are no special grounds arising out of its importance or difficulty to justify us in giving costs on the higher scale.

BOWEN and FRY, L.JJ., concurred.

Solicitors for Plaintiff: *Cooper & Co.*, for *Coopers, Newcastle-under-Lyme.*

Solicitors for *Sneyd*: *G. L. P. Eyre & Co.*, for *Joseph Knight, Newcastle-under-Lyme.*

Solicitors for the company: *Burchell & Co.*

(1) 31 Ch. D. 328. (2) 25 Ch. D. 651.

H. C. J.

## BRADSHAW *v.* WARLOW.

C. A.
1886
May 6.

[1885 B. 81.]

*Practice—Lancaster Palatine Court—Judgment by Default—Appeal—Time for appealing—Extension of Time—Rules of Palatine Court, Order xxxiii. r.* 21.

According to the true construction of Order xxxiii. rule 21, of the Rules of the Palatine Court of *Lancaster* a party against whom judgment has been given by default must make application to set it aside within six days if the Court be then sitting, and, if it be not then sitting, on the next day on which the Court shall be sitting to hear such motions.

An application for extension of time by a party who desires to apply to set aside a judgment made against him by default, may be made at the time when he makes the application to set aside the judgment, if the action is still pending.

THIS was an appeal from a decision of the Vice-Chancellor of the County Palatine of *Lancaster*, Mr. *H. F. Bristowe*, Q.C.

The action was brought for the recovery of a sum of money, and came on for trial at *Manchester* on the 24th of March, 1886. The Defendant not appearing, judgment was given for the Plaintiffs with costs. The sittings of the Palatine Court continued through March and April, and the Court sat for hearing motions on the 29th of March, and the 5th, 12th, and 19th of April.

On the 8th of April the Defendant gave notice of motion for the 12th of April to set aside the judgment as irregular, and that the action might be restored to the paper for trial at the next sittings, which would be held at *Liverpool*.

The motion was heard on the 19th of April, when the Vice-Chancellor refused the application on the ground that it was too late. The Defendant asked for an extension of time, but the Vice-Chancellor was of opinion that an application for extension of time ought to be made by a separate motion, and gave the Defendant permission to give short notice of such application.

The Defendant, however, did not give any notice, but appealed from the order of the 19th of April.

At the same time he applied to the Court of Appeal for an extension of time for making the application to set aside the judgment.

C. A. 1886 BRADSHAW v. WARLOW.

The grounds of the application were that two other actions were pending between the Plaintiffs and the Defendant, and that an agreement had been come to between the Defendant and the Plaintiffs' solicitor respecting them. As the Defendant understood this agreement, the present action was to stand over *sine die*, but according to the understanding of the Plaintiffs' solicitors the action which was to have been tried at the *Liverpool* sittings of the Palatine Court was to stand over till the next *Manchester* sittings. Therefore when the Defendant's solicitor learnt that the action was in the list of cases for the *Manchester* sittings, which began on the 23rd of March, he remonstrated with the solicitor for the Plaintiffs, but was informed in reply, by a letter dated the 18th of March, that the trial would be brought on in the usual course. The Defendant's solicitor wrote in reply that he should apply for a postponement of the trial on account of the agreement. On the 24th of March, when the action came on, counsel for the Defendant said that he had received a telegram from his clients instructing him to ask for a postponement of the trial; and upon the Vice-Chancellor refusing to accede to the application, the counsel said he had no instructions to appear for the Defendant at the trial. Judgment was accordingly pronounced against the Defendant in his absence. No step was taken by the Defendant till the 8th of April, when he moved to set aside the judgment as before stated.

*Romer*, Q.C., and *Rotch*, for the Appellant:—

The Vice-Chancellor's decision was erroneous in two respects. In the first place, the Defendant was in time within the meaning of the Order XXXIII. r. 21, of the General Orders of the Palatine Court, which allows for such an application either six days or until the next sitting of the Court (1). That gives the party an alternative, either to apply within six days or to wait till the first day of the next of the regular sittings of the Court which

(1) Order XXXIII., rule 21, is as follows: "Any verdict or judgment obtained where one party does not appear at the trial may be set aside by the Court or Vice-Chancellor upon such terms as may seem fit, upon an application made within six days after the trial, or at next sitting of the Court."

are held eight times a year at *Liverpool* and *Manchester* alternately. The next sittings of the Court following the trial in this case have not yet commenced, therefore the Defendant is still in time.

In the second place, it was not necessary to make a separate application for an extension of time. The Vice-Chancellor might have granted the extension under Order LI., r. 5, of the General Orders of the Palatine Court (1). In this Court applications are constantly made for an extension of time when the appeal comes on to be heard, and we now ask for that indulgence. The evidence shews that the Defendant has made a mistake, and believed that the Plaintiffs had agreed to postpone the trial.

[The counsel for the Respondents were not called on with respect to the construction of the rule of the Palatine Court, the Court being of opinion that the Defendant was out of time in making his application to the Court.]

*Kennedy*, Q.C., and *Horridge*, for the Respondents:—

Assuming that the Defendant was out of time the Court had no power to grant an extension of time, for the action was at an end when the time had expired: *Carter* v. *Stubbs* (2); *Walter* v. *James* (3).

[COTTON, L.J.:—In that case the action was entirely dismissed out of Court; here the action is still pending.]

If the Court has jurisdiction it is not a case in which such an indulgence ought to be granted. The Defendant had full notice that the action was coming on, and after judgment was given he delayed for an unreasonable time to make his application: *Collins* v. *Vestry of Paddington* (4).

*Romer*, in reply.

(1) Order LI., r. 5, is as follows: "The Court or Vice-Chancellor shall have power to enlarge or abridge the time appointed by these rules for doing any act or taking any proceeding upon such terms, if any, as the justice of the case may require; and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed."

(2) 6 Q. B. D. 116, 120.

(3) 34 W. R. 29.

(4) 5 Q. B. D. 368.

C. A. 1886 BRADSHAW v. WARLOW.

COTTON, L.J.:—

This is an appeal from a decision of the Vice-Chancellor of the County Palatine dismissing an application by the Appellant to set aside a judgment given in default of his appearance on the 24th of March last.

The first objection made to the appeal was that the notice of motion before the Vice-Chancellor was not given till the 8th of April for the motion to be heard on the 12th. It was therefore objected that the motion was out of time. In my opinion it was out of time. The question depends on Order XXXIII., rule 21, of the General Orders of the County Palatine Court, which is as follows. [His Lordship read the rule.] In my opinion the true construction of the rule is, that the application must be made within six days, if the Court is then sitting, and if not on the next day when the Court does sit, not, as has been suggested, on the first day of the next of the periodical sittings of the Court. In the present case the Court was sitting for more than six days after the 24th of March, and therefore the motion should have been made within six days.

The next question is whether the Court ought to have granted an extension of the time for making the application. I think the view taken by the Vice-Chancellor on this point was erroneous, and that it was not necessary to make a substantive application for an extension of time. The case of ordinary appeals is very different. A previous application is there generally necessary, because the appeal cannot be set down for hearing if it is out of time. But where a motion or an appeal can be brought on, and it is objected that it is out of time, the Appellant can always apply at the same time for an extension of time. But then the Respondent ought to have notice that such an application will be made in order that he may have an opportunity of adducing evidence on the question whether an extension of time should be permitted. In the present case no notice was given of an intention to apply for such an indulgence, and we therefore asked the Respondent whether he wished the case to stand over for the purpose of bringing evidence on the point. He declined this offer, and we must therefore decide the case on the materials which were before the Vice-Chancellor. [His Lordship then

referred to the facts relied on by the Appellant in support of his application for an enlargement of time, and continued:—] I am of opinion that the Appellant has not made out any case for asking us to assist him to deprive the Plaintiffs of the judgment which the Defendant allowed them to obtain, although he knew that the action was coming on for trial.

LINDLEY, L.J.:—

I am of the same opinion. With respect to the construction of Order XXXIII., rule 21, of the Palatine Court, I agree with what has been said by my learned Brother, that the application was out of time. But I also entertain a clear opinion that the Judge had power to enlarge the time. I also agree it was not necessary to make a separate application for an enlargement of the time. Therefore, brushing aside these objections as matters of mere form, the real question is whether it is right that the Appellant should have the indulgence that he asks. Looking at the case in the light of the pleadings in the action and of the facts which are before us, I can see nothing to excuse the Defendant in making default in appearance at the trial. The appeal must therefore be dismissed.

LOPES, L.J.:—

I am of the same opinion. When the case came before the Vice-Chancellor he decided that, according to the true construction of Order XXXIII., rule 21, the application ought to have been made within six days if the Court was then sitting, and if it was not sitting, at the next sitting of the Court, that is, not the next of the ordinary sittings, which take place eight times a year, but on the next day on which the Court would sit to hear such motions. I agree with that construction. In the present case as the Court continued sitting the Appellant had no longer than the six days.

On the other point I think the decision of the Vice-Chancellor was erroneous. He refused to consider the application for an enlargement of time, on the ground that it should have been the subject of a separate motion. But I think the application ought

C. A. 1886 BRADSHAW v. WARLOW. Lopes, L.J.

to have been entertained at the time, and the Court might have postponed the case for the purpose of adducing evidence if that had been applied for by the other side.

With respect to the merits, I agree with the other members of the Court that the Appellant has not shewn any grounds for the indulgence of the Court. The appeal must therefore be dismissed.

Solicitors: *Tomkies, Liverpool; Deane, Liverpool.*

M. W.

*Dictum of* COTTON, L.J., at p. 416, *applied. Re* HOWLETT (*decd.*). [1949] 2 All E.R. 490.

C. A. 1886 *May* 7, 8.

## *In re* HOTCHKYS. FREKE *v.* CALMADY.

[1885 H. 3254.]

*Equitable Tenant for Life—Devise including incumbered and unincumbered Estates—Interest—Repairs—Power or Trust for Sale.*

A testatrix gave "all my real and personal estate" to trustees "upon trust at their discretion to sell all such parts thereof as shall not consist of money," and out of the produce to pay her debts and funeral and testamentary expenses, and invest the residue, "and shall stand possessed of such real and personal estate, moneys, and securities" upon trust "to pay the rents, interest, and dividends and annual produce thereof" to *T.* during her life, with a clause of forfeiture on alienation, and after the decease of *T.* the testatrix devised and bequeathed "my said real and personal estate and the securities on which the same may be invested unto and to the use of *V. C.*, his heirs, executors, administrators, and assigns for ever, according to the nature and quality thereof respectively." At her death she was entitled in fee to the *P.* estate, which was unincumbered. Some time after her death a remainder in fee to which she was entitled in the *B.* estate, which was subject to mortgages made by prior owners and was out of repair, fell into possession, and its income was only sufficient to pay the interest on the mortgages. The trustees took out a summons for directions as to interest and repairs. The tenant for life contended that she could disclaim the *B.* estate, the remainderman contended that the rents of the *P.* estate were liable for the interest on the mortgages of the *B.* estate and for repairs of that estate. Vice-Chancellor *Bacon* held that the rents of the *P.* estate were not liable for either:—

*Held*, on appeal, that the will did not create a trust for conversion, but only gave a power of sale; that no power of management and applying rents in repairs was conferred on the trustees; that *T.* as equitable tenant for life was not bound to repair; and that the rents of the *P.* estate could not be applied by the trustees in repairing the *B.* estate, though the Court,

if applied to, could sanction the doing such repairs as were expedient on terms which would be equitable as between the tenant for life and the remainderman.

But *held*, that as the *P.* and *B.* estates were not specifically mentioned, but only formed parts of one gift in general terms, *T.* could not accept one and refuse the other.

*Guthrie* v. *Walrond* (1) and *Syer* v. *Gladstone* (2) distinguished.

*Held*, further, that under a trust of this nature the trustees had a discretionary power to apply, if expedient, the income of the unincumbered estate in paying such part of the interest on the mortgages as the rents of the mortgaged estate were insufficient to pay, but whether in case of their doing so there would not be equities to be adjusted between the tenant for life and the remainderman, *quære*.

MISS *HOTCHKYS* made her will, dated in January, 1868, by which she gave, devised, and bequeathed "all my freehold, leasehold, and copyhold lands and hereditaments, and all my real and personal estate of what nature or kind soever and wherever situate," unto and to the use of *Vincent Calmady* and two other persons therein named, their heirs, executors, administrators, and assigns, "upon trust at their discretion to sell and dispose of all such parts thereof as shall not consist of money, and out of the produce of such sale shall first pay all my just debts and my funeral and testamentary expenses, and shall then invest the residue of such moneys in, &c., and shall stand possessed of such real and personal estate, money, and securities upon trust to pay the rents, interests, and dividends and annual produce thereof unto my dear friend *Emily Tuson* for and during the term of her natural life as and for her separate estate, and so that the same shall not be subject to the debts or control of any husband of hers, and that her receipts alone be a sufficient discharge for the same, and I direct that if the said *Emily Tuson* shall alien or dispose of the same, or charge the same or any part thereof by anticipation, whether by her own act or by act of the law, the same shall be thenceforth forfeited to the use of the said *Vincent Calmady*, his heirs, executors, administrators, or assigns." Then, after providing that the trustees might effect the sales of all or any part of her estate either by public auction or private contract, and empowering them to give receipts to purchasers, she proceeded: "And from and after the decease of

(1) 22 Ch. D. 573. (2) 30 Ch. D. 614.

C. A. 1886 — *In re* Hotchkys. Freke v. Calmady.

the said *Emily Tuson* I give, devise, and bequeath my said real and personal estate and the securities on which the same may be invested unto and to the use of the said *Vincent Calmady*, his heirs, executors, administrators, and assigns for ever, according to the nature and quality thereof respectively."

The testatrix died on the 18th of November, 1869, entitled to a remainder in fee in the *Blatchborough* estate, which did not fall into possession till 1875, and entitled in fee simple in possession to the *Pancraswick* estate. The latter estate was free from incumbrances. The *Blatchborough* estate was subject to mortgages for £12,165, which were not debts of the testatrix. After the death of the testatrix, but before the remainder fell into possession, this estate became subject to further mortgages for £973 and £3115 9*s.* 7*d.* for payment of debts of a prior owner of the estate.

Miss *Tuson* was let into possession of the *Pancraswick* estate on the death of the testatrix, and had ever since received the rents by her agent. In 1875, when the remainder in the *Blatchborough* estate fell into possession, the trustees placed the management of it in the hands of an agent. The gross income of the *Pancraswick* estate was about £232. The income of the *Blatchborough* estate was £778 11*s.* 8*d.*, but the interest on the mortgages was £714 9*s.* 8*d.*, and Miss *Tuson* had never received any surplus.

The *Blatchborough* estate being a good deal out of repair, the question arose whether the trustees should effect the repairs, and out of what fund the expenses should be paid. The only personal estate held on the trusts of the will of the testatrix was a sum of debenture stock producing about £16 per annum.

The two trustees other than *V. Calmady* took out an originating summons against Mr. *Calmady* and Miss *Tuson* asking for the opinion of the Court whether the rents of the *Pancraswick* estate were liable as between the Defendants or otherwise to be applied for the purpose of keeping down the interest on the mortgages on the *Blatchborough* estate, and for the necessary repairs and outgoings connected with the management of the last-mentioned estate, and which the rents thereof were insufficient to meet, and whether the trustees were entitled to take possession of the *Pancraswick* estate for the purpose, and that it

might be declared what, if any, repairs might be carried out by the trustees out of the income of the estates, and that the trustees might be at liberty to raise by mortgage of the estates or any part thereof sufficient to pay the costs of all parties of the application.

Vice-Chancellor *Bacon* made an order declaring "that the rents of part of the real estate of the testatrix known as the *Pancraswick* estate, which is free from incumbrances, are not liable as between the Defendants or otherwise to be applied for the purpose of keeping down the interest upon the mortgages charged solely upon another part of the testatrix's estate known as the *Blatchborough* estate, and for the necessary repairs and other outgoings connected with the management of such last-mentioned estate and which the rents thereof are insufficient to meet." Liberty was given to the trustees to raise the costs of the application out of the debenture stock.

*Vincent Calmady* appealed.

*Marten*, Q.C., and *Medd*, for the appeal:—

We say that on the construction of the will there is not merely a power of sale but an absolute trust for sale with a wide discretion as to the time and mode of selling.

[COTTON, L.J.:—Is there more than a power to sell what is wanted for payment of debts?]

Yes; there is not a direction to sell such parts of the estate as may be wanted for a particular purpose, but a trust to sell what does not consist of money.

[COTTON, L.J.:—The ultimate gift contemplates the possibility of there being real estate.]

That may be satisfied by reference to the possibility of Miss *Tuson* dying or forfeiting her estate before there was time to sell. The cases support the view that this is an absolute trust for sale: *Doughty* v. *Bull* (1); *In re Raw* (2); *Robinson* v. *Robinson* (3); *Minors* v. *Battison* (4). If so, the trustee must have a power of interfering for the preservation of the property: *Pugh* v.

(1) 2 P. Wms. 320.
(2) 26 Ch. D. 601.
(3) 19 Beav. 494.
(4) 1 App. Cas. 428.

C. A. 1886 — *In re* HOTCHKYS. FREKE *v.* CALMADY.

*Vaughan* (1). It would very much hamper a trustee for sale who has power to postpone the sale, if during the postponement he has no power of managing the property so as to keep it in saleable condition. In *Vyse* v. *Foster* (2) trustees were allowed the expenses of building a villa.

[COTTON, L.J.:—That was not a question between tenant for life and remainderman.]

Then as to the connection of the two estates. Where two properties are comprised in one and the same gift the donee must take both or neither: *Guthrie* v. *Walrond* (3); *Talbot* v. *Earl Radnor* (4). The case is not one where the equitable tenant for life is entitled to be let in possession: *Tidd* v. *Lister* (5); *Taylor* v. *Taylor* (6). The tenant for life is bound to keep down the interest on the mortgages: *Revel* v. *Watkinson* (7). The case of *In re Fowler* (8) is strong as to the power of the trustee to repair. The testatrix intended the whole property to be kept in repair so that it might be preserved for the remainderman.

[*Powys* v. *Blagrave* (9), *In re Box* (10), and *In re Leigh's Estate* (11), were also referred to.]

*Farwell*, for the trustees.

*Millar*, Q.C., and *Cecil Russell*, for Miss *Tuson*:—

Miss *Tuson* is not liable to keep down the interest on the *Blatchborough* mortgage out of the rents of *Pancraswick*: *Syer* v. *Gladstone* (12). The principle of *Locke King's Act* is that a mortgaged estate bears its own burden. This is an attempt to make an equitable tenant for life responsible for permissive waste, which is against *Powys* v. *Blagrave* (13). Then can the power of sale make any difference?

[COTTON, L.J.:—Only in this way, as it strikes me: a trust for

(1) 12 Beav. 517.
(2) Law Rep. 8 Ch. 309.
(3) 22 Ch. D. 573.
(4) 3 My. & K. 252.
(5) 5 Madd. 429.
(6) Law Rep. 20 Eq. 297.
(7) 1 Ves. Sen. 93.
(8) 16 Ch. D. 723.
(9) Kay, 495.
(10) 1 H. & M. 552.
(11) Law Rep. 6 Ch. 887.
(12) 30 Ch. D. 614.
(13) Kay, 495; 4 D. M. & G. 448.

sale shews an intention to give the tenant for life the income of a mixed fund coming from both estates.]

We submit that there is only a discretionary power of sale to be exercised if money was wanted for the purposes of the will. The gift over to the remainderman is of real estate as well as personal. If Miss *Tuson* had died the day after the testator, it would have been impossible to say that there was a conversion out and out; for there are no words to affect with a trust for sale the property given to the remainderman. No power of management is here given to the trustees until sale. There is a well-known common form of such power, but the testatrix has not inserted any such power, and the Court cannot supply it. Whatever may be the liability of the tenant for life to interest she is under none for permissive waste. Now as to the two estates being made a common fund, the devising them together merely implies that the devisees are to take both with their legal incidents. There is no rule that a tenant for life is bound to pay the interest on charges if the rents are insufficient.

[LINDLEY, L.J.:—If *Blatchborough* was sold for a sum which would not pay the mortgages in full, I do not see how *Pancraswick* could be made liable for the deficiency.]

If *Blatchborough* alone had been devised, it could not have been contended that Miss *Tuson* would have been liable to make up the deficiency of the rents to pay interest. And how can the devising to her another estate make her liable to make it up? If *Pancraswick* is to be liable at all for interest on the mortgages, it ought to be raised in a way which will do justice as between tenant for life and remaindermen. Where trustees are in possession they can charge interest on the *corpus* if the rents will not pay it: *Dixon* v. *Peacock* (1).

[COTTON, L.J.:—Are the rents of *Blatchborough* insufficient to pay the interest?]

No; they are insufficient to pay interest and repairs, but not to pay interest alone. As to repairs, *Powys* v. *Blagrave* (2) governs the case. If a power of management such as the Appel-

(1) 3 Drew. 288, 292.
(2) Kay, 495; 4 D. M. & G. 448.

C. A. 1886 *In re* HOTCHKYS. FREKE *v.* CALMADY.

lant contends for is to be implied, the trustees might exhaust all the income in improvements. An arrangement as to repairs might be come to between the parties, who are both *sui juris*, but we oppose the doing them at the sole expense of the tenant for life, which is what is asked. In *Caldecott* v. *Brown* (1), there was no decision that the tenant for life was bound to do the repairs, it was only held that if he did them he was not entitled to charge the inheritance with the expense.

*Medd*, in reply :—

Where there is a trust for sale the trustees must have a power to keep the property in saleable condition, or the object of the trust might be defeated.

[COTTON, L.J. :—I am disposed to think that trustees for sale are under an obligation to keep the property in saleable condition; the question is out of what fund are the expenses to be paid?]

In *In re Aldred's Estate* (2) repairs were allowed out of moneys coming from other property settled to the same uses. Then as to treating the two estates as separate. There were in *Syer* v. *Gladstone* (3) gifts of the two properties by name, here there is only one sweeping gift, neither property being specifically mentioned, and the case is governed by *Guthrie* v. *Walrond* (4). If repairs are allowed at all, they ought not to fall solely on the remainderman.

*Cecil Russell* :—

*In re Aldred's Estate* turns only on the construction of the provisions in the *Lands Clauses Act* as to application of purchase-money, and has no bearing on the present case.

COTTON, L.J. :—

This is an appeal from an order of Vice-Chancellor *Bacon*, upon an application made to him by the trustees of the will of Miss *Bertha Hotchkys*, to ascertain what were their rights and powers with regard to the rents and profits of certain estates devised by

(1) 2 Hare, 144.
(2) 21 Ch. D. 228.
(3) 30 Ch. D. 614.
(4) 22 Ch. D. 573.

the will. By this will, made in January, 1868, the testatrix, without specifying distinct estates, devised all her real and personal estate to trustees upon trusts for the benefit of Miss *Tuson* for life and then for the Appellant absolutely. I will presently consider more particularly the nature of the trusts. The present question arises between the tenant for life and the remainderman. The Vice-Chancellor made a declaration "that the rents and profits of the real estate of the testatrix known as the *Pancraswick* estate which is free from incumbrances, are not liable as between the Defendants or otherwise to be applied for the purpose of keeping down the interest on the mortgages charged solely upon another part of the said testatrix's estate, known as the *Blatchborough* estate, and" (that word "and" should be "or") "for the necessary repairs and other outgoings connected with the management of such last-mentioned estate, and which the rents thereof are insufficient to meet."

The appeal is by the remainderman, who contends that the rents of *Pancraswick* are liable to be applied for all these purposes. First of all, it was said on his behalf, here is a trust for sale or absolute conversion, and that necessarily gives the trustees in whom the legal estate is vested a power of management, and enables them to apply the rents of the property comprised in their trust in such a way as to keep the whole of the property in repair. That to my mind does not touch the real question at all, which is not whether the trustees have the duty and power of keeping the property in repair cast upon them, but what they are to take in order to keep the property in repair, whether they are to take the rents which are the income of the tenant for life, or whether they are to take the *corpus*, which, as it must necessarily make a deduction from the rents, would throw the burden in fair proportion, upon the tenant for life and the remainderman.

Now with reference to the question whether there is a trust for sale so as to create an absolute conversion, in my opinion the Vice-Chancellor is right in the opinion he has expressed that there is not. After the gift to the trustees the testatrix goes on to say "Upon trust at their discretion to sell and dispose of all such parts thereof as shall not consist of money, and out of the

C. A. 1886 *In re* HOTCHKYS. FREKE *v.* CALMADY. Cotton, L.J.

produce of such sale shall first pay all my just debts and my funeral and testamentary expenses, and shall then invest the residue of such moneys in the Government stocks or funds of *Great Britain*, or on mortgage of any real estate in *England* or *Wales*, but not in *Ireland*, and shall stand possessed of such real and personal estate, money, and securities upon trust to pay the rents, interest, and dividends, and annual produce thereof, unto my dear friend *Emily Tuson* for and during the term of her natural life, as and for her separate estate, and so that the same shall not be subject to the debts or control of any husband of hers, and that her receipts alone be a sufficient discharge for the same." Then further on in the will there is an intermediate direction, which is only a direction how they are to sell with reference to that which has gone before, and then the testatrix says: "And from and after the decease of the said *Emily Tuson* I give, devise, and bequeath my said real and personal estate and the securities on which the same may be invested unto and to the use of the said *Vincent Calmady*, his heirs, executors, administrators and assigns for ever, according to the nature and quality thereof respectively."

In my opinion, although, as I have said before, the direction as to the sale is in form a trust, it is not a trust for conversion of the whole of the estate immediately on the death of the testatrix, when the will comes into operation, but a power in the form of a trust giving them a discretion whether to sell or not—a power to sell such part of the real estates as they shall in their discretion think it desirable to sell. Undoubtedly they may if they think it desirable, either for the purpose of payment of the debts or otherwise, sell the whole, but there is not a direction to them to sell the whole. In my opinion that is shewn not only by the terms of the ultimate trust for the remainderman, but also by the direction "that the rents, interest, and dividends and annual produce thereof" are to be paid to the tenant for life. That seems to me to get rid of a great part of the argument.

What, then, in that state of facts is the right as between the tenant for life and the remainderman? The estate was to be vested in the trustees during the tenancy for life. In my opinion, in a case where trustees have property vested in them

under circumstances like these, there is an obligation upon them, for the purpose of properly carrying out and performing their trust with regard to the property, to see that the property does not fall into decay from want of proper repair. But when the property has fallen into bad repair, the question will of course arise whether it is worth while to do the repairs. It may be that where there is a devise of two estates, one subject to an incumbrance not made by the testator, and the other not incumbered, it may not be worth while to expend any money out of the unincumbered estate for the repairs of the incumbered one, for it would be throwing away money to repair the property if the circumstances were such that no one but the incumbrancer would be benefited by the expenditure. Then of course the trustees would be wrong in applying anything not in mortgage to repair a property which, when repaired, would not be worth anything to the estate. No doubt if it was clearly for the benefit of the whole residue to repair the mortgaged property the Court would say that the trustees must do it, and that the money must be raised in such a way as not to throw the burthen unfairly either upon the tenant for life or upon the remainderman.

In the present case it might be a question whether the trustees could mortgage the *Pancraswick* estate, and whether, if it was worth while for the benefit of the entire estate to expend any money in repairs on the mortgaged estate, they ought not to raise it by selling a portion of the estate? The opinion of the Vice-Chancellor (and this was the contention of the tenant for life) was that under this devise it was possible for the equitable tenant for life to throw up the mortgaged estate and to say I will not take it. In my opinion that was wrong. It is true that where two legacies are given to a person by a will the legatee may say, "I am much obliged to the testator for legacy A. and I will take it, but I decline to take legacy B." The two things are not connected together so as to be part of the one thing given to the legatee. There are two things given to the legatee, and the legatee is in no way bound to take one if he does not like to take it, but on the other hand he may take the one entire and separate thing which is given to him without taking the other. In my opinion it does not at all depend upon

C. A. 1886 *In re* HOTCHKYS. FREKE *v.* CALMADY. Cotton, L.J.

the question whether it is given in one sentence or in two sentences, and that will explain the case of *Syer* v. *Gladstone* (1), which was pressed upon us in support of the contention of the tenant for life. In that case there was a gift of property and of certain things on the property. That was a case where there were two bequests, one of land or houses and the other of chattels. In my opinion those were two separate gifts of which the legatee might accept one and might reject the other. But here what is given to the tenant for life and to the remainderman is an aggregate, and what results from that aggregate is given to both of them. In my opinion under those circumstances if the tenant for life likes to accept the gift, and likes to accept it by entering into possession of part of the property, he cannot say I will take possession of this, and take it with the obligation thus thrown upon me, but at the same time I will reject another part of that one integral gift which is given to me by the testatrix.

According to my view, as I have already expressed it, the burthen of repairing, if it is necessary and proper, ought to be thrown upon the estate in such a way as not to throw it entirely upon the tenant for life or upon the remainderman. Where one estate is given to an equitable tenant for life he cannot be called upon to repair and cannot be made liable for neglecting to repair, and in my opinion the comprising with it another estate, although the gifts are not separable, does not throw upon the tenant for life, or enable the trustees to throw upon the tenant for life, a greater burthen as regards repairs than she would have been subject to if this had been simply a gift to her as equitable tenant for life of the *Blatchborough* estate alone.

There is only one other question, viz., as to the interest on the mortgages. That question does not at present appear to arise here after the opinion which I have expressed as to repairs, for the rents of the *Blatchborough* estate are sufficient to pay the interest; but in my opinion, where there is a single gift in this way to trustees, the income of the total may in their discretion be applied in keeping down the interest on a mortgage of one of the estates comprised in it. There may be a question whether as between the tenant for life and the remainderman there may

(1) 30 Ch. D. 614.

not in that case be some equity to be adjusted between them, but that question does not now arise.

LINDLEY, L.J.:—

I am entirely of the same opinion.

It appears to me that, having regard to the terms in which the will of the testatrix is framed, the tenant for life and the remainderman are each of them claiming a little too much. The will is in some respects peculiar. There is a trust for sale, but when you come to spell it out I think it is tolerably plain that it is really in the nature of a power rather than a trust. I cannot read the will as effecting a conversion, for I think that so to read it is utterly inconsistent with the expressions which are used. There is a power of sale, and there is unfortunately nothing whatever in the will pointing to what was to be done in the interval before the sale, beyond this, that Miss *Tuson* was to have the rents for her life. Nothing is said about repairs, nothing is said about management. We must then apply the ordinary rules of law to that condition of circumstances.

Now the tenant for life, I think, has put the case rather too high when she contends that she is at liberty to refuse to have anything to do with the *Blatchborough* estate and to take the other estate without reference either to the charges on the *Blatchborough* estate or the repairs of that estate. It appears to me that, having regard to the terms of the gift, she is to be considered, for the purpose of the construction of this will, as having had one aggregate property given to her for her life, and I cannot say that the interest upon the charges on any part of the property ought not to be paid out of the aggregate income of the whole. I agree with the Lord Justice *Cotton*. *Guthrie* v. *Walrond* (1) is more applicable to this particular devise than the case of *Syer* v. *Gladstone* (2), which is to be explained by the fact that according to the proper construction of the will in that case there were two gifts. This decision against the contention of the tenant for life does not come to much, because it appears that the rents of the *Blatchborough* property are more than sufficient to keep down the interest on the incumbrances, although

(1) 22 Ch. D. 573. (2) 30 Ch. D. 614.

C. A. 1886

*In re* HOTCHKYS. FREKE *v.* CALMADY.

Lindley, L.J.

it is of course possible that they may not remain so, in which event the point to which I have alluded might arise.

As regards the substantial question, that of the repairs, it appears to me there is no avoiding the application to this case of the rule laid down by Lord *Hatherley* in *Powys* v. *Blagrave* (1). The tenant for life is equitable tenant for life, and the remainderman is not entitled to throw upon her the burthen of keeping the property in repair. I think that is perfectly plain. Whether the property is to be regarded as one property or as two appears to my mind to be for this purpose immaterial. The remainderman cannot be entitled to throw upon the tenant for life the burthen of the repairs by paying for them out of the rents. I quite agree with what Lord Justice *Cotton* has said, that if it is shewn that it is judicious to make repairs, and the trustees come to the Court for authority to make them, that authority will be given, but it will be given on equitable terms as to the mode of paying the expenses. If such an application is made it will have to be considered whether the repairs are beneficial, and whether they ought to be made, and if so, how they ought to be paid for. It is unnecessary now to consider the question how the trustees would be authorized to raise the money, whether by sale or mortgage, or in some other way, but it must be done in a mode which is equitable as between the tenant for life and the remainderman, and not so as to throw the whole burden upon either.

LOPES, L.J.:—

I entirely agree with the opinion of the rest of the Court, and what has been stated leaves me nothing to add.

Solicitors for Appellant: *R. W. Childs & Batten*, for *Venning & Goldsmith, Devonport.*

Solicitors for Repondents: *Davidson, Burch, & Co.*

(1) Kay, 495.

H. C. J.

## WIMBLEDON LOCAL BOARD *v.* CROYDON RURAL SANITARY AUTHORITY.

[1886 W. 1357.]

C. A.
1886
NORTH, J.
*May* 7.
C. A.
*May*, 14, 17.

*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 32 [*Revised Ed. Statutes, vol. xvii., p.* 538]—"*Works for sewage purposes*"—*Ex parte Motion*—*Misrepresentation.*

The cleaning, levelling, and cementing the bottom of a pool, into which the effluent from sewage works flows :—

*Held*, by the Court of Appeal (reversing the decision of *North*, J.), to be a work for sewage purposes within the meaning of sect. 32 of the *Public Health Act*, 1875.

*Held*, by *North*, J., that a motion to discharge an *ex parte* injunction on the ground of its having been obtained by misrepresentation, is proper, though the injunction is about to expire.

*Bolton* v. *London School Board* (1) distinguished.

On the 22nd of October, 1881, the *Croydon* Rural Sanitary Authority, pursuant to the *Public Health Act*, 1875, s. 32, gave notice to the Local Board of *Wimbledon* and others of their intention to commence the construction of sewage works without their own district. The works not being objected to, the Local Government Board sanctioned a loan for carrying them out. Part of the scheme was to carry a sewer through land belonging to the *Wimbledon* Board, and on the 13th of March, 1883, that Board granted to the *Croydon* Board, for a consideration, the right to maintain and use this sewer, which was specified on a plan. This sewer passed into a pool, known as the *Western Pool*, which communicated with the River *Wandle*, and the *Croydon* Board passed through it the effluent water from a sewage farm which they occupied.

In 1882, *Selous*, the owner of the *Western Pool*, and *Syer*, his tenant, brought an action against the *Wimbledon* Board, and another action against the *Croydon* Board, to prevent the pollution of the pool, which actions were consolidated by order. On the 12th of January, 1885, Mr. Justice *Denman* gave judgment in the actions, and, among other things, restrained the *Croydon*

(1) 7 Ch. D. 766.

C. A. 1886

WIMBLEDON LOCAL BOARD v. CROYDON RURAL SANITARY AUTHORITY.

Board from further polluting the *Western Pool* by discharging sewage matter into it contrary to the provisions of sect. 17 of the Act. The *Croydon* Board appealed, but before the appeal had been decided, a compromise was entered into between them and *Selous* and *Syer*, by which it was agreed that the injunction against the *Croydon* Board should be dissolved, the *Croydon* Board undertaking to clean out and level the bottom of the *Western Pool*, which was very irregular and full of holes, and make a concrete bottom to it, so that the accumulation of sewage fungus, which had been complained of in the action, might be prevented. In order to do this it was necessary to get rid of the water in the *Western Pool*. On the 6th of April, 1886, the engineer of the *Croydon* Board, without any notice being given under sect. 32 of the Act, put a temporary dam across the upper part of the *Western Pool*, and another at the lower end, and made a ditch leading from the *Western Pool* above the upper dam, and carrying off the water from the upper part by means of a temporary wooden trough, supported on piles, and crossing the lower part of the *Western Pool*, and discharging below the lower dam. The water between the two dams was then pumped out. The *Western Pool* was partly within the district of the *Wimbledon* Board and partly within the district of the *Wandsworth* Board, but wholly without the district of the *Croydon* Board.

On the 22nd of April, 1886, the *Wimbledon* Board and the overseers of the parish of *Wimbledon* commenced this action against the *Croydon* Board, asking for an injunction to restrain them "from commencing or proceeding with any works for sewage purposes in and upon the *Western Pool* of the River *Wandle*, or any place without their district and within the parish of *Wimbledon*, contrary to the provisions of sects. 32 and 33 of 38 & 39 Vict. c. 55," and for damages. On the following day the *Wimbledon* Board obtained an *ex parte* injunction till the 28th, and on the 28th Mr. Justice *Mathew*, sitting for Mr. Justice *Pearson*, continued the injunction till the 5th of May or further order, the Plaintiffs giving the usual undertaking as to damages. The Defendants gave notice on the 4th of May to discharge the injunction, as having been obtained by misrepresentations and suppression of facts, and to have an inquiry as to damages. The case now came

on upon the application of the Plaintiffs for an injunction and on the Defendants' cross motion.

There was evidence that the upper dam rested to some extent on the land of the Plaintiff board, but that before the *ex parte* injunction was obtained such part of the dam had been removed, and there was no existing trespass. The Judge was of opinion that the evidence before the vacation Judge, when he granted the *ex parte* injunction did not disclose the facts of the case as fully as they ought to have been disclosed. There was evidence that the Defendants had sustained some damage by reason of the injunction.

The motion was heard before Mr. Justice *North* on the 7th of May, 1886.

*Bazalgette*, for the Plaintiffs:—

The Plaintiffs consider that the works will injure them; they are entitled under sect. 33 of the *Public Health Act* to have an inquiry by the Local Government Board. The Defendants having neglected to give the notices and issue the advertisements required under sect. 32, ought to be stopped from proceeding with these works.

The cross notice is irregular, inasmuch as the injunction, if wrong, would expire of itself. A motion to discharge it was superfluous, and such motion will be refused with costs: *Bolton* v. *London School Board* (1).

*Napier Higgins*, Q.C., and *John Henderson*, for the Defendants:—

The work the Defendants are doing is not a sewage work; it is merely in the nature of cleaning out a sewer; it would be absurd to require the sanction of the Local Government Board for such an operation. If it can be considered a sewage work, it is merely ancillary to the original scheme of the Defendant authority, and is covered by the notices and advertisements given and issued when the original scheme was promulgated.

An application for an *ex parte* injunction is one requiring *uberrima fides*: *Dalglish* v. *Jarvie* (2). Misrepresentation having

(1) 7 Ch. D. 766, 771. (2) 2 Mac. & G. 231, 243.

C. A. 1886

WIMBLEDON LOCAL BOARD v. CROYDON RURAL SANITARY AUTHORITY.

been used in obtaining the injunction *ex parte* the Defendants are right in seeking to discharge it.

*Bazalgette*, in reply.

NORTH, J. (after stating the facts, continued):—

It appears to me in the first place that the Judge had not as full information as he ought to have had with respect to the matter at the time at which the *ex parte* motion was made, and therefore the Defendants were quite justified in coming here and saying that the order was one which ought not to have been made.

But the question remains still whether, supposing the full matters had been brought before the Judge then as they have been brought before me now, he could then have made, and I now can make, an order to the same effect as that which was made by him upon that occasion. It appears to me that I cannot, and for this reason: it does not seem to me that this really is a case coming within the sections of the *Public Health Act* that have been referred to at all. It does not seem to me that the Defendant authorities are constructing or extending any sewer or other work for sewage purposes without their district. What they are doing in my opinion is simply this: they are wishing to continue the use of works completed three or four years ago. The use of them has been interrupted for a time, not by reason of any reference to these works themselves, but because the stream belonging to Mr. *Selous*, into which the effluent was discharged, was in such a condition that he was entitled to restrain the defendant from continuing that discharge. What they have done now has been not to extend their works, in my opinion, in any way, but by an arrangement with the gentleman who is the owner of the land interfered with by that discharge, they have agreed with him to concrete the bottom of his pool, and that is not the extending or constructing sewage works, in my opinion, within the meaning of the sections that have been referred to. It seems to me, therefore, they have not commenced either to construct or to extend sewage works within the meaning of that section at all, and that therefore, even with full information upon the matter, the injunction ought not to be granted.

C. A.
1886
WIMBLEDON LOCAL BOARD v. CROYDON RURAL SANITARY AUTHORITY.
North, J.

Then the point was suggested by Mr. *Bazalgette* that at any rate, if the motion by the Defendants to discharge the order in other respects were right, yet, inasmuch as it was only made on the day on which the order itself would expire (as a matter of fact it was the day before), the motion could not have served any useful purpose, and therefore the Defendants ought to pay the costs of it. A case was referred to by Mr. *Bazalgette* in which that course was followed, of dismissing with costs a motion to dissolve an order that died on the evening of the day on which the motion was made. To begin with, it appears to me that was not a case of moving to discharge a motion for irregularity. That seems to me to make a great difference between that case and this. Independently of that, even if I had taken the view that that case, so far as it went, was an authority in favour of the proposition for which Mr. *Bazalgette* cited it, it still would not have led to the result he suggests, because the order in this case contains not merely an injunction but also an undertaking by the Plaintiff to abide by any order the Court might make as to damages. It seems to me here that the order is one which ought not to have been obtained for the reasons I have given, and that under those circumstances, inasmuch as it is obvious from the affidavits that some damage has been sustained by the Defendants, they would be entitled to apply for and are entitled now to have a reference to inquire what the damage is, and therefore the motion for that purpose would be proper in any case.

D. P.

C. A.

The Plaintiffs appealed. The appeal came on to be heard on the 14th of May, 1886.

*Moulton*, Q.C., and *Bazalgette*, for the Plaintiffs:—

If the concrete bottom which the defendants are constructing is not a work for sewage purposes, what is it? The operations materially affect our property and rights. If proper notice had been given we could have objected. The Local Government Board would probably have allowed the work to be done, but only with such modifications as were judged necessary to prevent injury to us. We say that we have an absolute statutory protec-

C. A. 1886

WIMBLEDON LOCAL BOARD v. CROYDON RURAL SANITARY AUTHORITY.

tion under sect. 32, and that as what is being done is illegal, the question of balance of convenience and inconvenience does not arise as in ordinary cases of injunction. We do not ask for a mandatory injunction, but we wish to prevent the carrying out of works which will be injurious to us, without any safeguards against injury.

*Napier Higgins*, Q.C., and *John Henderson*, for the Defendants :—

We say that the making a concrete bottom to a pool is not the construction or extension of any work for sewage purposes, it is merely in the nature of cleaning or repairing. The Defendants are not commencing any new work, this is a mere incident to the original drainage scheme. We do not, however, object to having the matter brought before the Local Government Board, and we are ready to concur in having this done.

[A discussion then took place as to the terms of submission to the Local Government Board, and the result will be found embodied in the minutes of order given below. After the terms had been agreed upon judgment was given as follows :—]

COTTON, L.J. :—

I think we ought to express our opinion whether such a work as this is within the 32nd section of this Act. What the *Croydon* Sanitary Authority are doing is this. They have an outlet from their sewage farm into a branch of the River *Wandle*, and the owner of that branch, which was called the *Western Pool*, complained that a certain amount of sewage fungus came down and was left in the pool, where it putrified and became a nuisance to him. The bottom of the pool was very irregular. Then the *Croydon* Sanitary Authority, by agreement with the owner of the pool, determined to level the bottom of the pool, and to concrete it for a certain distance, probably some 250 feet from where the outlet was. Before doing that they gave no such notice as was required by the 32nd section of the *Public Health Act*, 1875. Mr. Justice *North* was of opinion that what they were doing was not a work for sewage purposes within the meaning of that section. It is conceded that the place where this is going to be done is

outside the *Croydon* district, and in fact is for the most part in the district of which the *Wimbledon* Board are the authorities, and is within the jurisdiction of the *Wimbledon* Local Board. Mr. Justice *North* thought this was not a work for sewage purposes. In my opinion he was wrong in that. It is not the commencement of a new system of sewage, or of a new system or mode of getting rid of the sewage, but the work is done to prevent the fungus of which I have spoken from being caught in the hollows which exist in the natural bottom of this pool. To enable them to get rid of that fungus they are preparing, not indeed to construct a sewer in the ordinary sense of the word, but to construct a fresh bottom to the pool with a view to carrying away this fungus. To my mind that fungus must be considered part of the sewage, for it arises in consequence of the sewage coming down the channel, which has its outfall into this pool. In order to carry that fungus away from the land of Mr. *Selous* the Defendants propose to level the bottom of the pool, and not only to level it, but to concrete it so that it should be a smooth surface capable of being flushed by letting in water. In my opinion that is a sewage work. It is very different from merely cleaning the pool. That would not be a work. It would be work, but it would not be a work, and although it might be done for sanitary purposes, it would not in my opinion be constructing a work for sewage purposes. But when you make the bottom of a hollow of concrete, and make it of concrete in order more effectually to carry sewage further down away from a person who complains of the effects of that sewage, that in my opinion is a work constructed for sewage purposes. It is said that the Defendants are not commencing the construction or extension of any sewer, and are not commencing a new system of sewering. They are not, but they are certainly extending that which they have already constructed down to this pool, and in my opinion we must in considering whether what they are doing comes within those words "commencing," etc., look to see whether the work is one which was contemplated in the original work done, and whether they are not beginning that which is in fact a work for sewage purposes. In my opinion they are beginning that which is something not contemplated or provided for in any

C. A. 1886

WIMBLEDON LOCAL BOARD v. CROYDON RURAL SANITARY AUTHORITY.

Cotton, L.J.

way by the previous sewage works, they are beginning (I will not say commencing) to construct that which in my opinion is a work and a work for sewage purposes, and if so then they are commencing a work for sewage purposes within the meaning of the Act. But really the substantial question is (and I am glad the Plaintiffs now see the case in that light) what ought to be done if there is any injurious effect produced either to the parish represented by the overseers or to any works of the *Wimbledon* Local Board. If there is, that of course ought to be set right, and although the *Croydon* Sanitary Authority have not given the proper notice, we are very unwilling to restrain them from doing this work, which apparently is very useful for some purposes, although it may have an injurious effect on property lower down the stream. We think that the terms which have been proposed and acceded to will give a reasonable result to this litigation and prevent any injury being done.

LINDLEY, L.J.:—

I quite agree with the interpretation put upon sect. 32 by Lord Justice *Cotton*, and do not wish to add anything more upon that point. I do not think it possible to come to the conclusion that this concreting is not a construction of a work for sewage purposes. I cannot imagine for what purpose the concrete is put in, except for some sewage purpose in connection with the sewer which the Defendants made in 1881, and I am quite satisfied that the Plaintiffs have taken the right view of the construction of the section.

I wish to add, what I think this Court has said over and over again, that it never will flinch from ordering work to be undone, if it has been forced on pending an appeal or pending a motion for an injunction.

COTTON, L.J.:—

I intended to add that. It does not apply to the case now before us, but I desire to mention it lest parties should think that they can gain any advantage by hurrying on a work pending a motion for an injunction. In all such cases, if, when the motion came on, I thought it a proper case for an injunction, I should

certainly order the parties who had hurried on the work to undo what they had so done.

LINDLEY, L.J. :—

I quite agree.

LOPES, L.J. :—

When once the nature of this work is understood, it seems to me impossible to come to any other conclusion than that it is a work for sewage purposes within the meaning of sect. 32 of the *Public Health Act*, 1875. I need say nothing further on that subject, as it has been so fully gone into by Lord Justice *Cotton*.

I only desire to add that I am very glad indeed that the parties have come to the arrangement they have made for the purpose of terminating this dispute between them.

---

The Court being of opinion that the works of the Defendants in the western pool of the branch of the River *Wandle* are works for sewage purposes within the meaning of sect. 32 of the *Public Health Act*, 1875, and the Plaintiffs and Defendants undertaking to submit to the jurisdiction of the Local Government Board as if the Defendants had given the notice required by sect. 32 of the said Act, and as if the Plaintiffs sent in objections thereto, and undertaking to submit the objections of the Plaintiffs and such works to the decision of the Local Government Board, and if necessary to settle special case for that purpose, and the Defendants undertaking to abide by the decision of the Local Government Board as to such objections and as to the propriety of the aforesaid works, and to make any modification in or addition to the said works which may be required by the decision of the Local Government Board, let the appeal motion stand over with liberty to apply. Both parties undertaking that upon the further hearing of this motion this Court shall have power to deal with the action as on the hearing thereof, the Court doth by consent order that all proceedings in the action in the meantime be stayed, and that no pleadings are to be delivered, but that the writ is to be considered as amended so far as necessary to raise all questions between the parties.

Solicitor for Plaintiffs: *W. H. Whitfield.*
Solicitors for Defendants: *West, King, Adams & Co.*

H. C. J.

C. A.
1886
May 18.

## HALL *v.* HEWARD.

[1885 H. 809.]

*Mortgage—Redemption—Mortgage of Realty and Personalty—Redemption by Executor.*

Real and personal estate were mortgaged together. The mortgagor died leaving a will of personalty, but intestate as to real estate. It was not known who was the heir-at-law, and the mortgagee entered into possession. The executrix of the mortgagor claimed to redeem the whole of the mortgaged property, which claim was resisted by the mortgagee, who insisted that her only right was to redeem the mortgaged personalty on payment of a proportionate part of the mortgage debt. The executrix brought an action for redemption, and *Bacon*, V.C., made a decree for the usual accounts as against a mortgagee in possession, directing that on payment of what was found due the mortgagee should convey and assign the mortgaged properties, real and personal, to the Plaintiff, subject to such equity of redemption as might be subsisting therein in any other person or persons. The Defendant appealed:—

*Held*, that this decree was right, for that the owner of the equity of redemption of one of two estates comprised in the same mortgage cannot insist on redeeming that estate separately, and cannot be compelled to redeem it separately, his right being to redeem the whole, subject to the equities of the other persons interested:—

*Held*, that although the heir-at-law, if known, ought to have been a party, the Court would not delay making a decree until he was ascertained and made a party:—

*Held*, that although a mortgagee in possession who voluntarily transfers his security is liable to account for the subsequent rents, he is subject to no such continuing liability when he transfers by the direction of the Court in a redemption suit.

BY indenture dated the 16th of April, 1880, *Rebecca Pearce*, in consideration of £275 advanced to her by *J. M. Heward*, conveyed to him in fee a freehold messuage at *Stamford*, and assigned to him certain Egyptian stock, subject to a proviso for redemption of both properties on payment of £275 with interest on the 16th of October then next, but in case default in payment should be made, "then and thenceforth upon trust and to the intent that the said *J. M. Heward*, his heirs, executors, administrators or assigns, without any further consent of the said *R. Pearce*, her heirs, executors, administrators or assigns, do and shall, whenever he or they shall think fit and expedient, absolutely sell and

dispose of the said premises hereby granted and assigned." Power was given to *Heward*, his executors, administrators or assigns, to give receipts, and it was directed that after payment of what was due on the security, he or they should "pay the surplus, if any, of the moneys to arise from such sale to the said *R. Pearce*, her executors, administrators or assigns, as personal estate, whether the same shall have arisen from the sale of the said freehold premises or stock."

*Heward* died in June, 1884, leaving a will appointing *Kate Heward*, the Defendant in this action, his universal legatee and sole executrix.

*Rebecca Pearce* died in July, 1884, leaving a will by which, after specifically disposing of her watch and some articles of household linen, she bequeathed the residue of her personal estate to *Maria Hall*, the Plaintiff in this action, and appointed her sole executrix. The will did not dispose of the real estate.

In August, 1884, the Plaintiff gave up possession of the messuage to the Defendant, who entered as mortgagee in possession and repaired and let the property. The Plaintiff deposed that she had given up possession in the belief that she had no interest in the freehold and no right to redeem it.

Towards the end of 1884 the Plaintiff, having consulted her solicitors, was desirous of redeeming the mortgaged property, and a correspondence took place between the solicitors of the parties, in the course of which the Plaintiff's solicitors insisted that she was entitled to redeem the whole property, real and personal, without prejudice to the rights of the mortgagor's heir-at-law, but the Defendant's solicitors insisted that the Plaintiff had no other right than to redeem the personal estate on payment of a rateable part of the mortgage debt. Both parties insisting on their views, the Plaintiff commenced this action for redemption against the Defendant. It was not known who was the heir-at-law of the mortgagor, but there was no evidence that she had died without an heir.

Vice-Chancellor *Bacon* made a decree for the usual accounts in the case of a mortgagee in possession, and directing that on payment by the Plaintiff of the balance found due the Defendant should convey and assign the real and personal estate comprised

C. A. 1886 HALL v. HEWARD.

in the mortgage to the Plaintiff, or as she might direct, free from all incumbrances by the Defendant, but subject to such right or equity of redemption as might be subsisting therein in any other person or persons. The Defendant was ordered to pay the costs of the action.

The Defendant appealed.

*Sayles* (*Marten*, Q.C., with him), for the Appellant:—

This mortgage only gives a power of sale and does not effect a conversion out and out: *Bourne* v. *Bourne* (1); *Wright* v. *Rose* (2). The real estate, therefore, retains its character of realty, and the Defendant claims to be entitled to the estate, there being no one entitled to redeem unless it turns out that there is an heir: *Burgess* v. *Wheate* (3); *Beale* v. *Symonds* (4); which cases apply here, as the mortgagor died before the passing of 47 & 48 Vict. c. 71, s. 4, which makes equitable interests liable to escheat. The personal representative, as such, cannot redeem a mortgage of real estate: *Catley* v. *Sampson* (5). I ask the Court, then, to hold that we can keep the real estate as owners, subject to the claims of the heir, on allowing the executrix to redeem the personalty on payment of a proportion of the mortgage debt. We are in the same position as if we had purchased the real estate from the mortgagor, in which case there must be an apportionment: *Newcombe* v. *Downe* (6); *Sambroke* v. *Hanbury* (6). A mortgagee in possession, if he transfer his security, remains liable for the rents (7), and we should therefore incur a formidable risk by transferring our security to the executrix. No decree for redemption can be made in the absence of the heir.

*Millar*, Q.C., and *Edward Ford*, for the Plaintiff:—

We contend that there is an absolute trust for sale in default of redemption at the time named. The direction is imperative, "then and thenceforth upon trust" that the mortgagee shall sell. The discretion is only as to the time of sale, and the trust of the surplus proceeds is for the mortgagor, her executors, adminis-

(1) 2 Hare, 35.
(2) 2 S. & S. 323.
(3) 1 Eden. 177.
(4) 16 Beav. 406.
(5) 33 Beav. 551.
(6) Seton on Decrees, 4th Ed. p. 1149.
(7) 1 Eq. C. Ab. 328, pl. 2.

trators or assigns as personal estate. The whole is made one fund of personalty. *In re Underwood* (1) supports the view that this is a trust and not a mere power. But suppose that is not so, we say that the judgment still is right. It went on the model of *Pearce* v. *Morris* (2), where Lord *Hatherley* held that a person interested in the equity of redemption of a part of the mortgaged property is entitled to redeem the whole. The decree is given in *Seton* on Decrees (3). A mortgagee cannot against his will be redeemed piecemeal, and if a person interested in the equity of redemption of part cannot redeem the whole, he cannot redeem at all.

[COTTON, L.J. :—Is there any case where the owner of one of two estates comprised in the same mortgage has been compelled to redeem that one estate separately ?]

We believe there is not.

*Marten*, in reply :—

*Sambroke* v. *Hanbury* (4) and *Newcombe* v. *Downe* (4) go on the principle of splitting the equity of redemption, and *Trestrail* v. *Mason* (5) decides that when real and personal estate are mortgaged together they must bear the debt rateably. This suit cannot proceed in the absence of the heir-at-law.

[COTTON, L.J. :—We shall not be inclined to allow the whole of the questions in this case to remain undecided because somebody who cannot be found is not made a party.]

The accounts cannot be taken in the absence of the heir : *Fell* v. *Brown* (6) ; *Palk* v. *Lord Clinton* (7).

[COTTON, L.J. :—Here is a deed containing a covenant on which the executrix can be sued, and the land may become valueless. Is it reasonable that she should not be allowed to get rid of her liability ?]

There is no sufficient reason given for not making the heir-at-law a party, and on the true construction of the deed he has an

(1) 3 K. & J. 745.
(2) Law Rep. 5 Ch. 227.
(3) 4th Ed. p. 1149, 1150.
(4) Seton on Decrees, 4th Ed. p. 1149.
(5) 7 Ch. D. 655.
(6) 2 Bro. C. C. 276.
(7) 12 Ves. 48.

C. A. 1886 HALL v. HEWARD.

interest. There is no conversion. In *In re Underwood* (1) the deed was very peculiarly framed, and there does not appear to have been any question raised whether there was conversion or not. The Court will not, unless compelled to do so, adopt so inconvenient a construction as that a mortgage effects a conversion from the day appointed for redemption. The words "upon trust" do not necessarily make the direction an imperative trust as distinguished from a power: *Bourne* v. *Bourne* (2); *In re Hotchkys* (3). Here, then, there is a power of sale only and not a trust for conversion. *Pearce* v. *Morris* (4) is distinguishable from the present case on two grounds: first, that the mortgagee had accepted the money; and secondly, that he was not a mortgagee in possession.

COTTON, L.J.:—

This case, which has been fully argued, raises points of some nicety. The Plaintiff is the executrix of a mortgagor, and seeks to redeem a mortgage comprising both real and personal estate. It is admitted that the will of the mortgagor does not pass her real estate, and her heir cannot be found. The Defendant contends that the Plaintiff is only entitled to redeem the personal estate comprised in the mortgage, and that the Defendant can retain the real estate till the heir-at-law appears. The question has been raised whether the mortgage deed has the effect of producing an absolute conversion so as to make the whole of the mortgaged property one fund of personalty. As the heir-at-law is not here it would, in my opinion, be wrong to decide that question unless it becomes absolutely necessary to do so; and in my opinion no such necessity arises, for assuming that the mortgaged realty remains land the executrix is, in my judgment, entitled to redeem. The mortgage comprises two properties—one of which, subject to the mortgage, belongs to the executrix. She therefore is entitled to redeem, but to redeem what? The Appellant says "to redeem the one estate which belongs to her." But there is no precedent for that. The owner of the equity of redemption in one of two estates comprised in the same

(1) 3 K. & J. 745.
(2) 2 Hare, 35.
(3) *Ante*, p. 408.
(4) Law Rep. 5 Ch. 227.

mortgage cannot claim to redeem that estate alone. The mortgagee might refuse to allow him to do so. So, on the other hand, the mortgagee cannot compel him to redeem that estate alone—he is entitled to redeem the whole, reserving the equities between him and the other part owner. He can redeem the whole, leaving the rights of the other parties interested in the equity of redemption to be decided afterwards. The case of *Pearce* v. *Morris* (1) is an instance of this—the owner of one-fourth of the equity of redemption was allowed to redeem the whole, leaving open the rights of the owners of the other three-fourths as between them and the party redeeming. In the present case if the heir-at-law were known it would be right to say that he must be here in order that the question might at once be decided whether he has any title. But neither side alleges that he is known, and it would be a new departure, and contrary to the spirit of recent legislation, to refuse redemption altogether until he can be found and made a party.

It is urged by the Appellant that there are special circumstances in this case. I need not notice *Catley* v. *Sampson* (2), for it was a case where only real estate was mortgaged, and therefore has no bearing on the present. But it is said by the Appellant, "If I transfer this mortgage I shall be liable for any future wilful neglect or default of the transferee." That is so, if a mortgagee in possession voluntarily transfers his security; but the rule does not apply where the Court orders redemption and directs the mortgagee to transfer the property.

There is only left then the objection for want of parties. That objection did not prevail in *Pearce* v. *Morris*, and the only argument in favour of it is, that the heir-at-law would not be bound by an account taken in his absence. But he would not be able to open the account unless he could shew something fraudulent or erroneous. I do not think that the objection is a substantial one; the amount of rents received being very trifling, and though some people are fond of litigation, we can hardly suppose that the heir-at-law would take proceedings to shew that a larger amount of rents ought to have been received.

As regards the costs, it takes a strong case to deprive a mort-

(1) Law Rep. 5 Ch. 227. (2) 33 Beav. 551.

C. A. 1886 HALL v. HEWARD. Cotton, L.J.

gagee of costs, but if he misbehaves himself he may be refused costs or even ordered to pay them. It might be urged here that the mortgagee ought not to be fixed with costs, because the liability to account for future rents could only be taken away by the order of the Court. But here the substantial question has been as to the right of the Plaintiff to redeem, the Defendant contending that she can hold the real estate as owner till the heir appears to claim it; and such a contention is quite different from the case of a mortgagee taking a fair point. The appeal must be dismissed with costs.

LINDLEY, L.J.:—

This case raises intricate and difficult points. The mortgage comprises two properties, a freehold house and a sum of Egyptian stock. In default of redemption on a certain day there is a trust or power of sale so expressed that it is not easy to decide whether it effects a conversion or not. This point, I think, we need not decide, as, in my opinion, the Plaintiff, in either view of the case, is entitled to redeem. The Plaintiff is the executrix of the mortgagor, and asks to be allowed to redeem the whole of the mortgaged property. The Defendant asks us to declare that the Plaintiff is entitled to redeem only the personal estate. Now has the Plaintiff a right to redeem a part of the mortgaged property? I think clearly not, except as a matter of arrangement; neither can she be compelled to redeem part. A person who has any right to redeem has a right to redeem the whole of the mortgaged property, and not a part of it, unless there is a special bargain. It is said that a redemption of the whole cannot be directed because the heir-at-law is not here. No doubt if he could be found he ought to be a party, but if he cannot be found is the mortgagee to keep the property free from the equity of redemption? There must be some way of avoiding that. The technical difficulty in directing redemption was got over in *Pearce* v. *Morris* (1), and the Vice-Chancellor has framed his judgment on that model, inserting words to preserve the right of the heir-at-law against the party redeeming. The only difficulty

(1) Law Rep. 5 Ch. 227.

is, that the heir-at-law will not be bound by the accounts, but that is overweighed by the consideration that if a redemption is not directed in this way the Plaintiff cannot redeem at all, for such a redemption as the Defendant proposes cannot be effectually made in the absence of the heir-at-law, who is interested in seeing that the mortgage debt is fairly apportioned between the mortgaged properties.

LOPES, L.J.:—

It is decided by *Pearce* v. *Morris* (1) that a person having a partial interest in the equity of redemption is entitled to redeem the whole property, saving the rights of the other persons interested. It was attempted to distinguish that case on the ground that here the mortgagee is in possession, and would after transferring the security be liable to account for future rents. I agree with the Lord Justice *Cotton* that this continued liability exists only where the transfer is made voluntarily, and not where it is made under an order of the Court.

Solicitors for Plaintiff: *Cooper & Bake.*

Solicitors for Defendant: *Joseph Mote & Son*, for *English, Stamford.*

(1) Law Rep. 5 Ch. 227.

H. C. J.

C. A. 1886 May 18, 19, 20.

## *In re* RUTHIN AND CERRIG-Y-DRUIDION RAILWAY ACT.

*Railway Company—Abandonment—Deposit—Compensation—Collateral Obligation—Covenant to build Station—Covenant to put up Fences.*

Where the Act incorporating a railway company contains a clause in the usual form that in case of the abandonment of the railway the parliamentary deposit shall be applicable towards compensating any landowners whose property may have been interfered with or rendered less valuable by the commencement, construction, or abandonment of the railway, a landowner can, as a general rule, only claim compensation on account of acts done or omitted to be done by the company under their statutory powers, and not on account of any collateral obligation entered into by the company.

But *held*, by *Cotton* and *Lindley*, L.JJ. (dissentiente *Lopes*, L.J.), that where a company has entered into a collateral obligation of such a nature that the breach of the obligation is necessarily involved in the abandonment of the railway and undistinguishable from it, such as a covenant to build a station, the breach of such obligation may be taken into account in assessing the diminution of value of the land.

*Held*, also, that a covenant to put up fences on the land taken by the company was not such an obligation as could form the subject of a claim for compensation out of the deposit.

THE *Ruthin and Cerrig-y-Druidion Railway Company* obtained their Act, in which the *Lands Clauses Act*, 1845, and the *Railway Clauses Act*, 1845, were incorporated, in the year 1876. Under the powers of this Act they gave notice to Messrs. *Owen* and *Farbridge*, the trustees of the will of Mr. *Thomas Hughes*, that they required a portion of their land for the purposes of the railway.

On the 3rd of May, 1882, an indenture was executed by which the trustees, in consideration of £725, which was to be taken in full compensation as well for the valuation of the land as for all injury by severance, &c., conveyed the parcel of land required for the railway to the company and their successors, subject to the covenants and conditions on the part of the company thereinafter contained. And by the same indenture the company covenanted with the trustees that they, their successors or assigns, would forthwith fence out the said land thereby conveyed so as to prevent any trespass to any adjoining lands: and should make and for ever maintain and keep open a station for the use

of passengers and goods upon a portion of the land therein particularly described, and make and construct and keep open necessary roads, footpaths, and approaches thereto.

The company entered on the land and made some cuttings and embankments there, but did not fence the land, nor erect the station. The line was never opened, and in the year 1884 an Act was passed for the abandonment of the railway, and the company was now being wound up.

The 23rd section of the *Ruthin and Cerrig-y-Druidion Railway Act*, 1876 (39 & 40 Vict. c. lxxxi), enacted that in case of the abandonment of the railway the parliamentary deposit "shall be applicable . . . towards compensating any landowners or other persons whose property may have been interfered with or otherwise rendered less valuable by the commencement, construction, or abandonment of the railway, or any portion thereof, or who may have been subjected to injury or loss in consequence of the compulsory powers of taking property conferred upon the company by this Act, and for which injury or loss no compensation, or inadequate compensation shall have been paid, and shall be distributed in satisfaction of such compensation as aforesaid in such manner and in such proportions as to the Chancery Division of the High Court of Justice may seem fit."

The land taken by the company had been offered to the trustees, who were willing to re-purchase it, but the terms upon which the re-purchase should take place had not yet been fixed.

The trustees of Mr. *Hughes*' will took in a claim in the chambers of Vice-Chancellor *Bacon* to be compensated to the extent of £600 out of the parliamentary deposit on the ground that the estate had been damaged and rendered less valuable by the commencement, construction or abandonment of the railway. The principal causes of damage relied on were the failure of the company to put up proper fences on the land; and their failure to build a station as agreed. They also relied on the loss of railway access to the estate by the abandonment of the railway. Numerous affidavits were filed by the claimants and by the liquidator of the company. In opposition to the claim evidence was given that the proposed station would not have added any value to the estate, because there was another station within five

C. A. 1886 *In re* RUTHIN AND CERRIG-Y-DRUIDION RAILWAY ACT.

minutes' walk called *Rhewl Station*, on the *Denbigh, Ruthin and Corwen Railway*, connecting those towns, and that there were no other markets in the neighbourhood. It was also in evidence that the trustees had opposed the passing of the company's Act of incorporation through Parliament on the ground that the construction of the railway would depreciate the value of the estate as a building site, and had obtained an amount of compensation much beyond the agricultural value of the land. The company also sought to prove by their affidavits that no fences were necessary on the land beyond those which existed before the commencement of the railway.

The Chief Clerk made his certificate on the 10th of December, 1885, and thereby refused to allow any compensation to the trustees, and Mr. *C. W. Farbridge*, who had survived his co-trustee, applied to the Vice-Chancellor to vary the certificate. The Vice-Chancellor refused the application, holding that the claim was not within the Act, and also that the claimant had proved no diminution in the value of the estate, and Mr. *Farbridge* appealed from his decision.

*Barber*, Q.C., and *Method*, for the Appellant:—

We claim for injury from the abandonment of the railway, by which access to the estate has been diminished. We can do this without claiming any damage on account of the construction of the railway: *In re Potteries, Shrewsbury, and North Wales Railway Company* (1). As special damage, we complain of the failure of the company to build the station, which would have been a great convenience to the property: *Wilson* v. *Northampton and Banbury Junction Railway Company* (2). The non-erection of the fence is also a serious injury. The company have altered the surface of the land by their cutting, and it is more dangerous for cattle than formerly.

*Swinfen Eady* (*Millar*, Q.C., with him), for the liquidator:—

There is no evidence that there has been any diminution in value in consequence of the abandonment of the railway. The trustees opposed the company's bill in Parliament, on the ground

(1) 25 Ch. D. 251. (2) Law Rep. 9 Ch. 279.

that it would diminish the value of the land as a building site: the Appellant cannot now contend that the abandonment of the railway is injurious to the property. The non-erection of the station is no injury to the estate: for there is another station within five minutes' walk, which is quite sufficient for the wants of the estate. With respect to the fences, there is no evidence that they are needed now more than they were before the railway was thought of.

But we also contend that the claim does not come within the scope of the Act. The deposit can only be applied in compensation for injury done by the exercise or the failure to exercise their parliamentary powers. If the landowner has any claim for breach of covenants entered into by the company, he can bring an action against the company or prove in the winding-up. That is a collateral obligation for which he cannot claim under the Act.

*Barber*, in reply:—

The breach of the covenants is caused by the abandonment of the railway, and is, in fact, undistinguishable from it. If the railway had been opened the station would have been built and the fences put up. The abandonment of the railway rendered it impossible to perform either of the covenants. We could not sue on the breach of the covenants; we are precluded from doing so by the company's Abandonment Act, sect. 2, which provides that the company "shall, except as in this Act provided, be absolutely freed and discharged from all obligations with respect to the making, maintaining, and completing the railway."

[LOPES, J.:—That can only refer to statutory obligations.]

COTTON, L.J.:—

In this case the *Ruthin and Cerrig-y-Druidion Railway* has been abandoned, and the question has been raised whether the Appellant has made out that his land has been lessened in value by the abandonment of the railway, and that he has a claim for compensation out of the parliamentary deposit. The claim depends on the 23rd section of the Act by which the company was established, which is in the usual form, and provides for the compensation of landowners whose land has been rendered less

C. A. 1886

*In re* RUTHIN AND CERRIG-Y-DRUIDION RAILWAY ACT.

Cotton, L.J.

valuable by the abandonment of the railway. I say, "by the abandonment of the railway," because although the Act uses the words "rendered less valuable by the commencement, construction, or abandonment of the railway," the Appellant makes no claim except in respect of the abandonment of the railway. We had those words before us recently in the case of *In re Potteries, Shrewsbury, and North Wales Railway Company* (1), in which we decided that the words "by the commencement, construction, or abandonment of the railway," were disjunctive, and the landowner's claim in this case is confined to injury from the abandonment of the railway. There are two special matters with respect to which the claim is brought, and the question we have to determine is whether the Appellant has made out that his land has been materially lessened in value in respect of these matters by the abandonment of the railway. In the case to which I have referred, the Court not only decided that the words must be read disjunctively, but also laid down that the diminution in value must be estimated by comparing the value of the land immediately before and its value immediately after the abandonment. In the present case a further question arises, namely, whether the compensation must be confined to loss occasioned by the action of the railway company under its statutory powers alone. The two special matters in respect of which the Appellant claims are these: one is in respect of a covenant by the company to make a station on the land taken; and the other of a covenant to put up fences where a deep cutting had been made, and the point to be considered is, how far the breach of these covenants can be taken into account in estimating the diminution in the value of the land due to the abandonment of the railway. It is clear that damages for a mere breach of covenant do not come within the section of the Act of Parliament; but I think you must take into account all the incidents before and after the abandonment; and there may be cases where there is such a covenant that the mere abandonment of the railway makes its performance impossible, and in such case I am of opinion that the consequent loss may be taken into account in estimating the deterioration of the value of the land. I think the covenant to build the station

(1) 25 Ch. D. 251.

in this case was one of that nature. It was one which might have materially affected the value of the property, for a station meant not a mere building but a place where the trains were to stop on the railway. But where there is no railway there can be no station, therefore the abandonment of the railway is of necessity a breach of the covenant to make the station.

Having stated this, I come to the question: Has the claimant made out his case by the evidence which he has produced? That seems to me the real question on this claim. It is for him to prove that there has been a diminution in value caused by the non-erection of the station. In my opinion he has not done so. At first sight it seemed impossible that the non-erection of the station should not be a loss to the property; but it appears from the evidence that there is already a station in the immediate neighbourhood, and although something was said about opening up the country, it was not shewn that the traffic at the proposed station would have been anything different from that at the existing station. It is not immaterial, though not conclusive, that when the company's bill was before Parliament the trustees opposed it on the ground that its construction would prove an injury to the property. It is manifest also, with regard to the evidence of the value of the property before and after the abandonment, that there can be no real difference between the value immediately before and immediately after the abandonment when, as in this case, it was obvious for some time that the scheme had failed and that there was no reasonable prospect of the company carrying it on. On the whole, I am of opinion that the claimant has failed to make out a case of injury from the non-erection of the station.

As regards the other point, namely, the covenant to put up and maintain the fence, the abandonment of the railway did not necessarily involve the breach of the covenant to make fences. I therefore doubt whether it is a case in which the covenant could be taken into account in assessing the deterioration of the land in value. But in this case also the claimant has entirely failed to shew by his evidence that the failure to make the fences has caused any diminution in value to his estate.

The appeal must, therefore, be dismissed on both points.

C. A. 1886 *In re* RUTHIN AND CERRIG-Y-DRUIDION RAILWAY ACT.

LINDLEY, L.J.:—

I am of the same opinion and for the same reasons, but as the question is a difficult one, I think it right to say a few words. The 23rd section of the company's Act is in the common form providing how the deposited sum shall be applied. [His Lordship read the section.] Here there are no words which point to injury arising from a breach of covenant by the company. The reason is obvious, that on the abandonment of the railway the right of proof against the covenanting parties for breach of the covenant still remains. We must be careful not to extend the meaning of the words of the section.

In this case the railway company entered into covenants to erect a station and to make fences on the land taken. Consider the effect in two points of view. The mere existence of such a covenant may increase the value of the land, but we must not confuse the abandonment of the railway with a breach of covenant. The abandonment may diminish the value of the land. The railway may be made but the covenants be broken, or the railway may be abandoned and yet the covenants be performed. If the abandonment and the breach are undistinguishable, then the case may be within the Act, but when you can distinguish between the breach of covenant and the abandonment you can only claim in respect of the abandonment.

Such a claim requires careful scrutiny. In the case cited of *In re Potteries, Shrewsbury and North Wales Railway Company* (1) it was established that some injury was done, and we directed an inquiry as to the amount. In the present case there has been an inquiry, and the claimant fails to shew that the property has been diminished in value. It is altogether a strange story. The claimant first complained that the property would be injured by the construction of the railway, now he complains that it has been injured by its abandonment. At first I thought there was something in the claim on the covenant to build a station, for the abandonment of the railway would necessarily involve a breach of that covenant. But the claimant has not made out his case on the evidence. The existence of another railway and a station so close to the proposed station has prevented him from proving that he

(1) 25 Ch. D. 251.

has suffered any loss from the non-erection of the station covenanted to be erected. Then as to the other claim, for not putting up the fences, I do not believe that this has in any way diminished the value of the property. Therefore, on both claims he has failed to make out his case.

LOPES, L.J.:—

The question turns on the effect of the Act. The claimant seeks compensation in respect of the abandonment only. I do not put so liberal a construction upon the section referred to as the other Lords Justices. The section says that the deposit is to be applied towards compensating any landowners whose property may be interfered with or rendered less valuable by the commencement, construction, or abandonment of the railway, or loss in consequence of the compulsory powers conferred on the company by this Act. In the case cited (*In re Potteries, Shrewsbury and North Wales Railway Company* (1) ) it was held that these words were to be read disjunctively. Here we have only a claim in respect of the abandonment of the railway. It is material to consider what is meant by the depreciation being caused by the abandonment. In my opinion, it means depreciation solely caused by what is done by the company under the authority of Parliament, or by the non-exercise of its statutory powers. It is only in respect of this that the landowner can claim compensation, and the Court cannot increase the compensation on account of any collateral obligation incurred by the company. In a case like the present, the landowner is entitled to say that owing to the abandonment of the railway he has lost the advantages of the railway, but he cannot call in aid the fact that by that abandonment arrangements made outside the Act have become impracticable. That is my view of the meaning of the section. With respect to the measure of the injury, it has been laid down in *In re Potteries, Shrewsbury and North Wales Railway Company* that it is to be determined by the value of the land immediately before and immediately after the abandonment. That is a decision by which I am bound, although it seems to me that the value

(1) 25 Ch. D. 251.

C. A. 1886 *In re* RUTHIN AND CERRIG-Y-DRUIDION RAILWAY ACT. Lopes, L.J.

of the land must be very much the same immediately before and immediately after the act of abandonment; because notice of the intention to abandon the railway must be given some time before the abandonment, and after that time there cannot be much change in the value of the land.

With respect to the question of fact, has the land been rendered less valuable by the abandonment? I am clearly of opinion that it has not been rendered less valuable. It is a very bold thing for the Appellant to contend that it has. I believe that if the land had been put into the market immediately before and immediately after the abandonment, the value would have been found to be much the same. And I say it is a bold thing for the Appellant to contend that there has been a depreciation, because before the bill passed through Parliament the trustees tried to throw out the bill on the ground that the making the railway would be injurious to the property, and now the Appellant seeks compensation on the ground that the abandonment has been highly injurious. For every reason, therefore, I am of opinion that the claim was properly disallowed; and that this appeal must be dismissed with costs.

Solicitors for the Appellant: *Robinson, Preston, & Stow.*
Solicitors for Respondent: *Rooks & Co.*

M. W.

## *In re* BARNARD.
## EDWARDS *v.* BARNARD.

C. A.
1886
May 20.

[1885 B. 862.]

*Bill of Exchange drawn against Partnership Firm—Acceptance by one of the Partners—Joint or separate Liability—Practice—Originating Summons—Estate of deceased Partner—Rules of Supreme Court*, 1883, *Order* LV., *rr.* 3, 10.

A bill of exchange was drawn against a firm of *B. & Co.* *B.*, one of the partners, accepted the bill, signing the name of the firm "*B. & Co.*," and adding his own underneath. *B.* died, and the holder of the bill took out an originating summons for the administration of *B.'s* estate, on which an order was made for the administration of the estate, distinguishing the separate from the partnership debts:—

*Held*, that the acceptance of the bill was the acceptance of the firm, and that the addition of *B.'s* name did not make him separately liable.

And, it having been proved that *B.'s* estate was insufficient for the payment of his separate debts, and therefore that no part would be available for payment of the partnership debts, the summons was dismissed.

Whether a joint creditor of a partnership firm can take out an originating summons for the administration of the estate of the deceased partner, *quære*.

*WILLIAM A. M. BARNARD*, who was a retired colonel in the army, in 1876 entered into partnership with *J. H. Dudman* in *St. Swithin's Lane*, as *East India* agents, to which was afterwards added the business of wine merchants, under the name of *Barnard & Co.* The partnership was regulated by a deed dated the 21st of December, 1876. The capital was furnished by *Barnard*, and *Dudman* managed the business and purchased the wines. The banking account of the firm was kept at the *Imperial Bank* in *Barnard's* name alone, but he had a private account at another bank.

On the 6th of March, 1883, a Spanish wine merchant named *José de Agreda* drew a bill of exchange of that date on Messrs. *Barnard & Co.* for £49 7*s.*, payable six months after date, on account of wine consigned to them. This bill was accepted by Col. *Barnard* in the following form:—

"Accepted; payable at the *Imperial Bank, Lothbury.*
"*Barnard & Co.*,
"*W. A. M. Barnard.*"

C. A. 1886 *In re* BARNARD. EDWARDS *v.* BARNARD.

Colonel *Barnard* died in June, 1885, having appointed his wife, the Defendant, sole executrix of his will. The will was proved on the 24th of July, 1885. After his death the bill of exchange was indorsed to the Plaintiff, *Ernest Edwards*, who took out an originating summons against the executrix in the ordinary form as a creditor, for the administration of the real and personal estate of the testator. On the 19th of January, 1886, the summons came before Vice-Chancellor *Bacon* at Chambers, when an affidavit was filed by the Defendant stating the existence of the partnership, and the Vice-Chancellor made an order in the following terms: "It is ordered that the following accounts and inquiries be taken and made, that is to say (*inter alia*) An account of what is due to the Plaintiff and all other creditors of the said *W. A. M. Barnard*, distinguishing the debts due from his separate estate from the debts due from the partnership of *Barnard & Co.*" And, after directing the usual accounts of the testator's funeral and testamentary expenses and assets, it was ordered that the testator's personal estate should be applied in payment of his debts and funeral and testamentary expenses in a due course of administration.

From this order the Defendant appealed.

On the hearing of the appeal further evidence was adduced of the facts relating to the partnership, including an affidavit of the surviving partner, and also shewing that the whole of the testator's separate assets would be expended in payment of his separate debts, leaving no residue for the creditors of the firm.

*Dunham*, for the Appellant:—

The Plaintiff is not a separate creditor of the testator but a joint creditor of the firm. He has no claim except as the indorsee of the bill of exchange which was drawn on and accepted by the firm. The fact that the acceptance is also signed by the testator makes no difference: this was only done for the purpose of authenticating the signature of the firm. No one can accept a bill except the drawees. The firm were the drawees, and it was accepted payable at the *Imperial Bank*, which was their bank. The testator's private account was at another bankers. *Jackson* v *Hudson* (1); *Steele* v. *M'Kinlay* (2).

(1) 2 Camp. 447. (2) 5 App. Cas. 754.

[LINDLEY, L.J., referred to *Owen* v. *Van Uster* (1).]

That being so, the Plaintiff had no *locus standi* to take out a summons for administration under Order LV., rule 3, nor could the Judge properly make such an order as he has done. The Plaintiff ought to have brought an action in the ordinary way and taken such an order as in *Hills* v. *M'Rae* (2); *Seton* on Decrees (3); *In re McRae* (4). The summons ought to be entirely dismissed; these proceedings can never produce any practical result, as the separate estate will be entirely consumed by the separate debts.

*Ashton Cross*, for the Plaintiff:—

The drawer of the bill had never heard that there was any partnership. He always dealt with the testator as the sole member of the firm and gave credit to him alone. The acceptance must be taken according to the intention of the parties, and the testator could have had no object in signing the acceptance in his own name except to make himself separately liable; if it would not operate as an acceptance it would operate as an indorsement and make him liable to the holder: *Steele* v. *McKinlay* (5).

But, if the Plaintiff had only a joint claim against the firm there was no irregularity in his taking out an originating summons. He has a claim against the separate estate if there should be any residue after satisfying the separate claims, and he is right in pursuing his claim in the least expensive way. If the evidence which has now been brought before the Court had been brought before the Vice-Chancellor he might have permitted the summons to be amended and the surviving partner to be brought before the Court under Order XVI., rule 11. The Court can make the same order on a summons as if it were an action commenced by writ: *Judicature Act*, 1873, s. 100; *In re Fawsitt* (6).

*Dunham*, in reply as to the costs.

(1) 10 C. B. 318.
(2) 9 Hare, 297.
(3) 4th Ed. p. 1211.
(4) 25 Ch. D. 16.
(5) 5 App. Cas. 772.
(6) 30 Ch. D. 231.

C. A. 1886

*In re* BARNARD. EDWARDS *v.* BARNARD.

COTTON, L.J.:—

This is an appeal from an order of Vice-Chancellor *Bacon* in which he directed inquiries and accounts respecting the estate of *W. A. M. Barnard.* The question on which the appeal mainly depends is this. Is the Plaintiff, who claims under a bill of exchange, a separate creditor of the testator or a joint creditor of the firm of *Barnard & Co?* It is possible that as between the Spanish merchant who drew the bill and the testator's estate different considerations might apply; but the Plaintiff, as the indorsee of the bill, can only claim on the bill according to its form. The bill is drawn on *Barnard & Co.* and it is accepted payable at the *Imperial Bank* by *Barnard & Co.* with the name *W. A. M. Barnard* subsequently added. It is material to decide at the present time whether this constitutes a separate or a joint debt, because we have not to consider simply whether the summons to administer *W. A. M. Barnard's* estate was regularly taken out; but this further point arises, that if the debt is only a liability of the firm, it is hardly probable, or even possible, that any good can arise to the Plaintiff by going on with such a proceeding. For if the Plaintiff is only a joint creditor of the firm the separate debts of the testator must be first paid, and he will get nothing till all the separate creditors are paid, and if they will exhaust the estate it will be useless for him to maintain the proceedings. Where no such difficulty arises, and there may be assets sufficient to pay both classes of creditors, it may be immaterial to decide at the hearing whether the Plaintiff is a separate or joint creditor. But here it is of the essence of the case—the whole matter depends upon it.

In my opinion the Plaintiff is simply a creditor of the firm, because his only claim is a bill drawn on *Barnard & Co.* If there had been no other member of the firm except the testator it might have been different, but on the evidence there was another partner who is still alive and carrying on the business which was carried on by himself and the deceased partner. The deed of 1876, which has been put in evidence, establishes clearly the existence of the partnership, and we can only come to the conclusion that it was that firm on which the bill was

drawn, and that it was accepted on behalf of the firm. The evidence before us on this point was not before the Vice-Chancellor, but on that evidence we can come to no other conclusion than that which I have stated.

But the name of *W. A. M. Barnard* was also signed to the acceptance, and a question on the effect of that signature has been raised in this case. I cannot come to the conclusion that it created any separate liability in him. By law the acceptance only binds the parties to whom the bill is addressed; therefore in this case the acceptance only binds the firm of *Barnard & Co.* We have no evidence for what reason *W. A. M. Barnard* put his name to the acceptance, but whatever his reason was, it did not make him separately liable on the acceptance. The case of *Steele* v. *M'Kinlay* (1) was cited by the Respondent. In that case a person who was not a party to the bill indorsed it, and it was held that a person not a party to a bill may make himself liable by indorsing it. But that is very different from the acceptance of a bill. *W. A. M. Barnard's* signature might have had some effect as between him and the drawer of the bill, if the consideration for the bill were taken into account; but it could give no right to the Plaintiff, who is a mere holder by indorsement, and has no claim under the bill except against the firm.

Then with respect to the summons, it is contended that a creditor of the firm cannot institute proceedings against the separate estate of a deceased partner in this way. I have already stated that there is another ground on which we think this summons ought to be dismissed, and therefore I give no opinion on this objection, except to say that people in the situation of this Plaintiff would be well advised to bring an action in the ordinary way instead of taking out a summons like this. But we do not expressly decide the question whether he had a right to commence proceedings by an originating summons. Here it is proved that the estate of the testator is insufficient to pay the separate debts, and that being so, the Plaintiff, as a creditor of the partnership estate, can derive no advantage from prosecuting these proceedings, and therefore in our judicial discretion we think it right to discharge the order of the Vice-Chancellor.

(1) 5 App. Cas. 754.

C. A. 1886 *In re* BARNARD. EDWARDS *v.* BARNARD.

With respect to the costs, considering the fact that evidence produced before us was not produced before the Vice-Chancellor, and having regard to the correspondence between the parties, I am of opinion that, although the order must be discharged, and the summons dismissed, the proper order will be that it be dismissed without costs.

LINDLEY, L.J.:—

I am of the same opinion. The Plaintiff is the indorsee of a bill of exchange, therefore he has no right arising out of the consideration for the bill; he can only claim according to the tenor of the bill. On looking at the bill we find that it was drawn on *Barnard & Co.*, and accepted by *Barnard & Co.* with the name of *W. A. M. Barnard* written underneath. The first question is, what is the effect of that acceptance? We must inquire who *Barnard & Co.* are. We now know, which the Vice-Chancellor did not, that there was a partnership between *Barnard* and *Dudman*, and the surviving partner has made an affidavit that the bill was a partnership bill, and that he is the surviving partner. We therefore come to this, that there was a firm consisting of two partners, and the only question is whether it is a joint acceptance or the separate acceptance of one of the partners? I am of opinion that it is an acceptance of the firm. I thought at first it was like the case of *Owen* v. *Van Uster* (1); but in that case there was no authority for one of the partners to accept bills for the firm, and therefore it was held that, as he was one of the partners of the firm named as drawees, and accepted the bill in his own name, he was separately liable. That was not a case like this, in which the partner who signed the bill had authority to bind the firm. Here the Plaintiff, being a joint creditor of the firm, takes out an originating summons, claiming to be a creditor of *W. A. M. Barnard*, and asking for the administration of his estate. Therefore the Plaintiff assumes the character of an ordinary separate creditor—he assumes that he is what he is not; his rights are of a different kind. Now that the facts have been brought before us, we see that his claim was wrong. His right was to have the estate of the testator administered in the ordinary way in which the estate of a deceased

(1) 10 C. B. 318.

partner is administered, and to obtain the same sort of order as that which was made in *Hills* v. *M'Rae* (1). We have to consider that most salutary rule, Order LV., r. 10, which provides that it shall not be obligatory on the Court to make any order on a summons for the administration of the estate of a deceased person if the questions between the parties can be properly determined without such order. Here the Plaintiff is not a creditor: it is well-established law that he has no claim against the separate estate till all the separate creditors have been paid, and it is established as a matter of fact that no separate estate is available; so that it is quite inconceivable that anything will ever come to the Plaintiff. Therefore I think the summons ought to be dismissed.

With respect to the costs, I agree that under the circumstances the summons should be dismissed without costs.

LOPES, L.J.:—

I am of the same opinion. The first question is whether this is the debt of the firm or of *W. A. M. Barnard.* The question was raised before the Vice-Chancellor whether there was any partnership at all. Upon the evidence before the Vice-Chancellor I should possibly have thought there was no partnership; but fresh evidence has been brought before us, from which I have come to the conclusion that there was a partnership. That being so, I come to consider the position of the Plaintiff. He is the indorsee for value of a bill of exchange, and claims on that bill only. Against whom does he claim? Look at the bill; it is drawn on the firm and accepted by the firm, with the name of *W. A. M. Barnard* written under it. Then who is liable? Certainly the firm; and for this reason, that the only persons who can accept a bill are the drawees. An acceptance is an engagement to pay the amount for which the bill is drawn in money, and can only be given by the person against whom the bill is drawn. Therefore the only persons against whom an action could be brought on the bill would be the firm, and it follows that the Plaintiff is a creditor of the firm only.

With respect to the form of the summons, I agree with what

(1) 9 Hare, 297.

C. A. 1886 *In re* BARNARD. EDWARDS *v.* BARNARD.

has been said by the other members of the Court. The summons will therefore be dismissed without costs.

There will be no costs of the appeal.

Solicitors for the Appellant: *Gedge, Kirby, & Millett.*

Solicitors for the Respondent: *Wood, Bird, & Wood.*

M. W.

---

C. A. 1886 *May* 25, 28.

## *In re* HARGREAVES & THOMPSON'S CONTRACT.

[1885 H. 4414.]

*Vendor and Purchaser—Summons under Vendor and Purchaser Act—Return of Deposit—Interest—Costs of investigating Title—Vendor and Purchaser Act*, 1874 (37 & 38 *Vict. c.* 78), *s.* 9 [*Revised Ed. Statutes, vol. xvii., p.* 289].

In exercising the summary jurisdiction given by the 9th section of the *Vendor and Purchaser Act*, 1874, the Court has power not only to answer the question submitted to it, but to direct such things to be done as are the natural consequence of the decision.

Therefore where the Court decided that the vendor had not shewn a good title or answered the requisitions, the Court ordered the vendor to return the deposit with interest at 4 per cent. from the day when it was paid, and to pay the purchaser's costs of the investigation of the title.

*In re Higgins & Hitchman's Contract* (1) and *In re Yeilding & Westbrook* (2) approved.

THIS case came before the Court on a summons taken out under sect. 9 of the *Vendor and Purchaser Act*, 1874.

The vendors were *W. Hargreaves* and others, and the property, which was sold by auction in lots, was freehold land at *Bowness*, in *Cumberland*. *J. Thompson* was the purchaser of two of the lots, comprising about fifteen acres, and paid a deposit of 10 per cent. on the purchase-money. Nothing was said in the particulars of sale about the minerals under the land, but the purchaser afterwards discovered evidence that the minerals under about thirteen acres, which were enfranchised copyholds, belonged to the lord of the manor.

The purchaser accordingly took out a summons asking that it might be declared that the purchaser's requisitions had not been

(1) 21 Ch. D. 95. (2) 31 Ch. D. 344.

sufficiently answered by the vendors, and that a good title had not been shewn in accordance with the conditions of sale, and that the vendors might pay the costs of the application and might repay the deposit with interest.

This summons was heard by Mr. Justice *Pearson* on the 21st of January, 1886, when his Lordship held that the vendors had shewn a good title to the property, being of opinion that there was no proof that the minerals really belonged to the lord.

From this decision the purchaser appealed.

The Court of Appeal held that there was sufficient proof that the minerals belonged to the lord of the manor, and that it was not a case in which compensation could be given to the purchaser, even if the Court had jurisdiction to give compensation under the summons, as to which the Court expressed no opinion. The Court, therefore, made a declaration that the vendors had not made a good title to the property sold, and ordered the deposit to be returned.

After the Court had given judgment this further question was raised.

*Cozens-Hardy*, Q.C., and *Darley*, for the Purchaser:—

We ask that the deposit may be repaid, with interest at 4 per cent. from the time when it was paid. This was allowed in *In re Metropolitan District Railway Company and Cosh* (1). The purchaser is also entitled to the costs of investigating the title. This was allowed by Vice-Chancellor *Hall* in *In re Higgins & Hitchman's Contract* (2), and by Mr. Justice *Pearson* in *In re Yeilding & Westbrook* (3).

*Everitt*, Q.C., and *Oswald*, for the Vendors:—

It may be that the purchaser would be entitled to all he asks if he had brought an action, but that would have been by way of damages. The Court has no jurisdiction to give either the interest or the costs of investigating the title on a summons under the *Vendor and Purchaser Act*. In *In re Young & Harston's Contract* (4) the Court held that the purchaser could not, on such

(1) 13 Ch. D. 607.
(2) 21 Ch. D. 95.
(3) 31 Ch. D. 344.
(4) 29 Ch. D. 691.

C. A. 1886 — *In re* HARGREAVES AND THOMPSON'S CONTRACT.

a summons, recover interest which had been paid under a mistake. With respect to the costs of investigating the title, Vice-Chancellor *Hall* doubted the jurisdiction to make the order, and Mr. Justice *Pearson*, in following his decision, treated it as an innovation. The practice is therefore not settled, and we submit that it is irregular.

1886. May 28. COTTON, L.J.:—

This was an application under the *Vendor and Purchaser Act*, and the main question we disposed of the other day, but there arose this question, upon which we thought it better to reserve our judgment. The purchaser, who succeeded in establishing that the vendors had not a good title, asked to have the return of the deposit, and also interest on the deposit, and the costs which he had incurred in investigating the title. The 9th section gives a special jurisdiction, and the only jurisdiction we have on this form of proceedings is whatever the Act of Parliament has authorized the Court to do, and in my opinion we ought not to treat an application under this section in the same way as if an action were brought for specific performance, or for rescinding the contract, or for any other purpose, but we must see what is the consequence of that which we have decided, and which the Act of Parliament undoubtedly gave us authority to decide.

The section gives power "to a Judge of the Court of Chancery in *England* in Chambers, in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of or connected with the contract (not being a question affecting the existence or validity of the contract), and the Judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid." There is no doubt about the power, which we have already exercised by our decision, to determine whether the requisitions are answered or not, and if there are other questions specified here we have to decide those. But we are also to make such order on the application as shall appear to the Court or Judge just. Now, in my opinion, although the Court is not in the position in which it

would be if it had the litigants before it in an action properly brought according to the established practice of the Court, still there is authority given us not only to decide the questions asked, but to make an order which would be just, as the natural consequence of what we have decided. Although no doubt interest cannot be given on the deposit except by way of damages, and the cost of investigating the title would not be given to the purchaser if he brought an action except by way of damages, yet they are damages which, without any special case being made, would be awarded, and properly awarded, either by a Judge or by a jury in a case where the vendor could not make a good title to that which he had purported to sell. And, in my opinion, this Act of Parliament authorizes us not only to make an order for a return of the deposit, but to give in addition that which without any special circumstances and under ordinary circumstances would be the consequence if an action had been brought to recover damages. In doing so we are not treating it as an action for damages, because, in my opinion, we could not go into any special case which the purchaser might make to get extraordinary damages or special damages, but can only give damages which naturally flow as the right of the purchaser from the order that we have made declaring that the vendors have not made a good title.

Therefore, the proper order here I think will be this: After the declaration as to title which we have made, we shall make an order on the vendors to return the deposit with interest at £4 per cent. from the time when the deposit was paid, and also to give to the purchaser the costs of investigating the title, which have been thrown away; the amount of the costs to be ascertained by the Judge in Chambers if the parties should differ.

There have been two cases referred to where much the same thing was done. One was before Vice-Chancellor *Hall* in *In re Higgins & Hitchman's Contract* (1), where he exercised the authority with some doubt. That was followed by Mr. Justice *Pearson* in *In re Yeilding & Westbrook* (2). But, in my opinion, although they seem to have made the order with some hesitation as to the jurisdiction, the proper construction of the Act is that which I

(1) 21 Ch. D. 95. (2) 31 Ch. D. 344.

C. A. 1886

*In re* HARGREAVES AND THOMPSON'S CONTRACT.

Cotton, L.J.

have stated. It certainly would be inconvenient if we could not make the order; because then, notwithstanding we should declare that the title was a bad one, and that the purchaser was not bound to complete, it would be necessary, if anything more was asked for excepting the return of the deposit, that the parties should be left to an action.

I am not much influenced by the consequences where one has to deal with the construction of an Act of Parliament, because in my opinion the question is simply what is the construction of the Act of Parliament. But I feel no doubt, construing this fairly, that this is the view which we ought to take of the Act of Parliament, and that we ought to make the order accordingly. I think interest ought to be given from the day when the deposit was paid, on this ground, that at that time the vendors tried to sell what they had no title to. Therefore from the very time when this deposit was made the vendors were in the wrong. It is different from a case where, in consequence of delay or otherwise, the purchaser may have had a right to say the contract is at an end, and he will not complete. Then it may be that the deposit would only be wrongfully held from the time when the purchaser, having a right so to do, had declared that he would be no longer bound by the bargain. But here from the very first the vendors were wrong in purporting to sell that which they had not, namely, the minerals as well as the surface.

LINDLEY, L.J.:—

I have no doubt myself that the purchaser is entitled not only to have his deposit back, but to have it with interest at 4 per cent. from the time when it was paid, and also to have the costs of investigating the title. I do not think that was seriously disputed. But a doubt was raised whether this was the proper method of asserting his rights, and whether the Court had jurisdiction to make an order to the above effect under the provisions of the 9th section of the *Vendor and Purchaser Act*, 1874. The late Vice-Chancellor *Hall*, who was one of the most cautious men, thought the Court had jurisdiction, although he had some little doubt about it, and the late Mr. Justice *Pearson* took the same view, making use of the observation that if Vice-Chancellor *Hall*

had made an innovation it was an extremely useful one, and he should follow it. But when we come to look at the 9th section I confess I cannot entertain any doubt about the matter, because what the Court is empowered to do is this: It is to make any order which upon the application shall appear just, and then the applications which may be made are specified in this way: "Applications in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of or connected with the contract (not being a question affecting the existence or validity of the contract)." So that upon a summons taken out under this Act you cannot question the validity of the contract, *e.g.*, you cannot raise any question whether it is fraudulent or not. The reason for this is obvious enough. The object of the Legislature was to enable either vendor or purchaser to obtain the decision of the Court upon some isolated point instead of being compelled to have recourse to the whole machinery which would be put in motion by an action or suit for specific performance. Now one of the questions which arises on the contract is the simple question as to interest and expenses. I quite agree that you cannot under this section dispose of what would be the subject of an action for damages of an extraordinary kind; such for example as the demand made in *Bain* v. *Fothergill* (1), by the purchaser to obtain from the vendor extraordinary damages contrary to the general rule. But all such damages as interest and expenses of investigating the title, which, although they are called damages are matters rather for computation and taxation than for an inquiry, the Court has authority to order to be paid. I am therefore of opinion that Vice-Chancellor *Hall's* doubt was unfounded, and I quite agree in the order which Lord Justice *Cotton* has pronounced.

LOPES, L.J.:—

What the Court is ask to give in this case is interest on the deposit and the costs of investigating the title. At one time I had some doubt whether the Court had jurisdiction to give interest and costs of investigating the title having regard to the special words of the 9th section, but on further consideration I

(1) Law Rep. 6 Ex. 59; 7 H. L. 158.

C. A. 1886 *In re* HARGREAVES AND THOMPSON'S CONTRACT. Lopes, L.J.

am clearly of opinion that those words are sufficient to cover a case of this kind, the words, "Such order on the application as shall appear just." What we are asked to give, namely, the interest and the costs of investigating the title seem to me to be the natural consequence of the decision at which we have arrived. No doubt they are matters in the nature of damages, and that is what for some little time caused me to have some hesitation. It is perfectly clear that an action of *assumpsit* might have been brought, and in that action these matters might have been recovered. I think not only that it is within the words of the section, and that we have jurisdiction to do what we have done, but I think it is a wholesome decision, for any other course would lead to multiplicity of litigation, which would not be desirable. I entirely agree with what has been said.

Solicitors for Appellant: *Johnston, Harrison, & Powell.*

Solicitors for Respondents: *Flux & Leadbitter*, agents for *Dobinson & Watson, Carlisle.*

M. W.

C. A. 1886 Jan. 19, 20.

## MUTUAL LIFE ASSURANCE SOCIETY *v.* LANGLEY.

[1883 M. 854.]

*Mortgage—Foreclosure—Priority—Fund partly in Court and partly in the Hands of Trustees—Notice—Stop Order—Costs—Plaintiffs first and last Mortgagees.*

When an assignment is made of an interest in a trust fund part of which is in Court and part in the hands of the trustees, the assignee in order to complete his title must, as regards the fund in Court, obtain a stop order, and as regards the fund in the hands of trustees give notice to the trustees.

Decision of *Pearson*, J., affirmed.

An incumbrancer who obtains a stop order on a fund in Court does not lose his priority over a previous incumbrancer who has obtained no stop order, by the fact that he had notice of the previous incumbrance at the time of obtaining the stop order, if he had no notice of it when he took his security.

*Elder* v. *Maclean* (1) observed upon.

A mortgagor was entitled to a reversionary interest in the residuary

(1) 5 W. R. 447.

estate of a testator, and was also entitled to a life interest in certain sums of money under his own marriage settlement.

Before 1872 he mortgaged both his reversionary and life interests to divers persons. Notice of all these mortgages was given to the trustees of both funds before any notice of the next mentioned mortgage had been given. In 1872 he mortgaged his reversionary interest alone to the Defendant, who gave notice to the trustees of that fund. In 1876 and subsequent years the mortgagor made five subsequent mortgages of his life interest to the Plaintiffs, of which notice was given to the trustees of that fund. The Plaintiffs in 1880 took a transfer of the securities prior to the Defendant's mortgage of 1872.

The Defendant took two further charges on the reversionary interest, of neither of which did he give notice to the trustees thereof.

An action having been brought by the Plaintiffs for foreclosure of the reversionary and life interests:—

*Held* (reversing the decision of *Pearson*, J.), that the Defendant on paying off the Plaintiffs' mortgages which were prior to his mortgage of 1872 was entitled to an assignment of both properties, although his mortgage included only one:

*Held*, that as regards the Defendant's two further charges on the reversionary property, and the Plaintiffs' five mortgages on the life interests, they must be redeemed in order of date respectively, notwithstanding the Plaintiffs' notices as to the life interests:

*Held*, also, that the Plaintiffs thus becoming the last mortgagees as well as the first must pay the costs of the suit if they did not redeem.

THIS was an appeal from a judgment of Mr. Justice *Pearson* (1).

*De Castro Fisher Lyne* was entitled to a life interest in a sum of £8000 comprised in his marriage settlement dated the 20th of October, 1857, and to an expectant interest, also for his own life, in another £8000 settled on his wife, should he survive her.

Under the will of Mr. *Lyne Stephens* he was also entitled to one ninety-third share expectant on the decease of Mrs. *Lyne Stephens* in the following property:—

(*a.*) The proceeds of an estate called *Lynford*, in the county of *Norfolk*, vested in the trustees of the said will upon trust for *Yolande Marie Louise Lyne Stephens* during her life, and after her death upon trust for sale.

(*b.*) Various sums of large amount invested on mortgage and on government and other securities.

The estate of Mr. *Lyne Stephens* was being administered by the Court in a suit of *Bulkeley* v. *Stephens*. The investments had been from time to time varied, but at the dates of all the instru-

(1) 26 Ch. D. 686.

C. A. 1886 MUTUAL LIFE ASSURANCE SOCIETY v. LANGLEY.

ments hereinafter stated there were part of these funds in Court to the credit of the action, and part were invested in the names of the trustees of the will.

In this state of things the following mortgages were made by *De Castro Fisher Lyne*:—

Two mortgages dated the 13th of March, 1865. One was made to *Anne Tubb* for £1000, of a moiety of the life interests, and a moiety of the *Lyne Stephens* property. This was ultimately transferred to *H. W. Hadfield*. The other was made to *Esther Macdonald* for £1000 of the other moiety of the life interests, and the other moiety of the *Lyne Stephens* property.

A mortgage dated the 11th of March, 1868, to *B. Cotton* for £1000 of the entirety of the *Lyne Stephens* property only.

A further charge dated the 20th of December, 1872, to *M. Tatham* for £1000 of the entirety of the life interests and of the *Lyne Stephens* property.

Of all these mortgages notice was given to the trustees of the will and to the trustees of the settlement at various dates, but all before the 27th of June, 1876.

By indenture of the 28th of May, 1872, *Lyne* mortgaged to the Defendant *Charles Langley* the *Lyne Stephens* property for £800. Notice of this was given to the trustees of the will on the 27th of June, 1876.

By indenture of the 27th of February, 1878, *Lyne* mortgaged the *Lyne Stephens* property and the life interests to *Pym* and *Nicolle* for £200. *Pym* and *Nicolle* had no notice of the prior mortgage to *Langley* of the 28th of May, 1872. Notices of this charge were given to both sets of trustees before the execution of the deed next mentioned.

By a deed of the 17th of December, 1880, the mortgages of the 13th of March, 1865, the 11th of March, 1868, the 20th of December, 1872, and the 27th of February, 1878, were transferred to the Plaintiffs.

*Lyne* made two further mortgages of the *Lyne Stephens* property to *Langley*, one dated the 27th of August, 1874, for £220, on which only £100 remained due. The other dated the 7th of July, 1878, for £200. No notice to the trustees was given of either of these mortgages.

*Lyne* made five other mortgages of the life interests to the Plaintiffs, dated respectively the 22nd of August, 1876, 15th of June, 1877, 7th of March, 1878, 21st of August, and 28th of October, 1879, with policies to cover them. Notices of these mortgages to the settlement trustees were duly given at or about their respective dates.

On the 25th of January, 1883, the Plaintiffs, who had obtained by correspondence in October, 1882, notice of *Langley's* mortgage of the 28th of May, 1872, obtained a stop order on the funds in Court in the suit of *Bulkeley* v. *Stephens*. *Langley* never obtained any stop order.

The present action was brought by the *Mutual Society* against *Langley*, some subsequent incumbrancers, and the trustee of the mortgagor, who had become bankrupt, for the foreclosure of the mortgaged premises.

The trustee of the mortgagor and all the subsequent mortgagees, except three, disclaimed; and those three did not appear, but were served with notice of the appeal.

Mr. Justice *Pearson* held that the Plaintiffs had priority over *Langley* by virtue of the mortgage for £200 of the 27th of February, 1878, in respect of the funds in Court: but that *Langley* had priority over that mortgage in respect of the property in the hands of the trustees of the will: and he made a decree for redemption or foreclosure, the effect of which was that *Langley* could not obtain an assignment of the life interests without redeeming the five incumbrances of 1876, 1877, 1878, and 1879, which were posterior to his mortgage of 1872. From this judgment *Langley* appealed. He claimed that on payment off of the £4500 comprised in the five mortgages transferred to the Plaintiffs in December, 1880, he was entitled to an assignment of the life interests as well as the *Lyne Stephens* property without redeeming the Plaintiffs' five incumbrances of 1876 to 1879; and then that the Plaintiffs would have to redeem him by paying off his £800 mortgage of the 28th of May, 1872, with interest and costs and what he should have paid Plaintiffs as above. He claimed also entire precedence for his mortgage of the 28th of May, 1872, over the £200 mortgage of the 27th of February, 1878, as well as regards funds in Court as property out of Court.

C. A. 1886

MUTUAL LIFE ASSURANCE SOCIETY v. LANGLEY.

*W. W. Karslake*, Q.C., *A. G. Langley*, and *S. B. L. Druce*, for the Appellant:—

We admit that the Appellant is bound to redeem the Plaintiffs' mortgages prior to his own mortgage of the 28th May, 1872. But when he does so, he is entitled to have a conveyance of all the property comprised in the Plaintiffs' security of the 17th of December, 1880, not the reversionary interest in the *Lyne Stephens* property alone, but the life interest under the will and settlement; and he is entitled to this conveyance without paying off the incumbrances of the Plaintiffs on those life interests which are subsequent in date to his own mortgage. The Plaintiffs can only consolidate their prior mortgages, they cannot tack the subsequent incumbrances to them, as they have not the legal estate: *Titley* v. *Davies* (1); *Mills* v. *Jennings* (2); *Harter* v. *Colman* (3); *Neve* v. *Pennell* (4); *Jennings* v. *Jordan* (5).

With respect to the second point we contend that the Plaintiffs got no priority over the trust fund for their mortgage of the 27th of February, 1878, by getting a stop order on the funds in Court. In the first place, the Plaintiffs, when they got their stop order had notice of our charge on the fund, and, therefore, the stop order was unavailing to obtain priority over us: *In re Holmes* (6); *Elder* v. *Maclean* (7); *Livesey* v. *Harding* (8). In the second place, our previous notice to the trustees was sufficient to give us priority over the whole fund. So long as any part of the funds remain in the hands of the trustees their duties and responsibilities continue, and they are the proper persons to receive notices of incumbrances. It would be different if the whole of the funds were in Court: *Thompson* v. *Tomkins* (9); *Matthews* v. *Gabb* (10); *Loveridge* v. *Cooper* (11); *Bartlett* v. *Bartlett* (12).

*Cozens-Hardy*, Q.C., and *Farwell*, for the Plaintiffs:—

With respect to the second point relied on by the Appellant

(1) 2 Y. & C. Ch. 399, n.
(2) 13 Ch. D. 639.
(3) 19 Ch. D. 630.
(4) 2 H. & M. 170.
(5) 6 App. Cas. 698.
(6) 29 Ch. D. 786.
(7) 5 W. R. 447.
(8) 23 Beav. 141.
(9) 2 Dr. & Sm. 8.
(10) 15 Sim. 51.
(11) 3 Russ. 1.
(12) 1 De G. & J. 127, 139.

there is no authority for the proposition that the stop order was not effectual because we had notice of the Defendant's charge.

[COTTON, L.J.:—You need not address the Court on that point.]

Then it is said that the Defendant's notice to the trustees was sufficient to affect the whole fund though a large part of it was in Court. There is no foundation for that contention. The Court is the trustee of that part of the fund which is in Court: *Warburton* v. *Hill* (1); *Haly* v. *Barry* (2); *Bridge* v. *Beadon* (3); *Pinnock* v. *Bailey* (4); *Meux* v. *Bell* (5); *Thorndike* v. *Hunt* (6).

With respect to the other ground of appeal, we say the Defendant has no right to an assignment of any parts of the property on which he has no security. They do not come within his contract, and he has shewn no equity to consolidate the properties. It is not a case which comes within the principle of tacking, for there are no intermediate incumbrances to be defended against. It is a claim to marshall the securities, for which there is no authority.

*W. W. Karslake*, in reply, as to the effect of the stop order.

COTTON, L.J.:—

Two points have been argued here, one perhaps of some little difficulty, and the other possibly of some importance, if the views taken by Mr. Justice *Pearson* were established.

I will deal with the one that was opened by Mr. *Karslake* first. It was this. As I understand, on these properties of Mr. *Lyne* there were various mortgages. He had two classes of property. He had a life interest and a reversionary interest in property under the will of Mr. *Lyne Stephens*. Then, prior to the mortgage in 1872 obtained by the Appellant Mr. *Langley*, the life interest and also his reversionary interest under Mr. *Lyne Stephens*' will had been mortgaged. Then Mr. *Langley*, the Appellant, took a mortgage on one only of those properties, namely, on the interest of the mortgagor under *Lyne Stephens*' will. Then subsequently

(1) Kay, 470.
(2) Law Rep. 3 Ch. 452.
(3) Ibid. 3 Eq. 664.
(4) 23 Ch. D. 497.
(5) 1 Hare, 73.
(6) 3 De G. & J. 563.

C. A. 1886

MUTUAL LIFE ASSURANCE SOCIETY v. LANGLEY.

Cotton, L.J.

to that, the Plaintiffs in 1876 obtained a mortgage on the life interest only, and on some policies. I need not go into that. As I understand, what Mr. Justice *Pearson's* decree has done is this: as the Plaintiffs had in 1880 obtained an assignment of the mortgages on both classes of property prior to the Plaintiffs' mortgage on one of them, he required the Defendant *Langley* to pay off all the debts due on the mortgages previously to the Defendant's mortgage, and gave him only one of the classes of property which were comprised in those mortgages, because Mr. *Langley* did not pay off the debts due to the Plaintiffs on the mortgages of the life interest which were subsequent to the mortgage of Mr. *Lyne*. Now in my opinion that was erroneous. Just let us see what the position of Mr. *Langley* was before the Plaintiffs took their subsequent mortgages on the life interest. He had a mortgage only on the reversionary interest. Then he would have been foreclosed at the instance of the first mortgagees of the two classes of property, unless he paid off the entirety of their debt, and if he paid off the entirety of their debt, there being no subsequent mortgage, and the only interest being that of the mortgagor, he would have been entitled to have handed over to him the entirety of the property which was a security for those debts. It is very true that he had no interest whatever in the life estate, he had an interest only in the reversionary property—but if he wished to redeem, or wished to avoid foreclosure, he must pay off the entirety of the debt due to the prior incumbrancer upon the property mortgaged to him, and also upon the other property. It would have been the right of the first mortgagee to require this, and it would have been his right if he had wished to redeem on this footing. That being so, subsequently to that, the Plaintiffs got a mortgage upon the life interest, and upon the life interest only. In my opinion by so dealing with the life interest, the mortgagor could not alter or vary the rights which, not by contract, but from his position as a matter of equity arising from that position, Mr. *Langley* was entitled to previously to the time when the mortgagor granted the subsequent mortgage to the Plaintiffs. In my opinion it is not a question of tacking, and it could not be supported upon that. Nor is it a question of consolidation. It does not rest upon either of those

two grounds, but upon the principle that nothing which the mortgagor could subsequently do by dealing with the equity of redemption could interfere with or prejudice his prior mortgagee, Mr. *Langley*. In my opinion the decision was wrong, and the proper form of decree will be upon the Defendant paying whatever is due upon the previous mortgages, both of the life interest and the reversionary interest, he may redeem both those properties and have them assigned to him. When he has done that, so far as the Plaintiffs are the next incumbrancers to him they will be entitled to redeem him.

I do not think it is necessary to go through all the cases. The principle has been enunciated in those consolidation cases, that nothing which the mortgagor, the owner of the equity of redemption, may do, can prejudice the position of his previous mortgagee, so as to subject him to greater responsibilities, or subject him to a greater burden than he would have had but for those dealings with the equity of redemption. It is said that that is immaterial, and that Mr. *Langley* is getting something as to which he had no security whatever. Now he is getting it simply in this way—to avoid foreclosure, and in order to redeem and to make himself first incumbrancer, he is entitled to pay off, and he may be required to pay off, not part only, but the entirety of the mortgages, and the debts due upon the previous mortgages; and if he pays off the entirety of the debts, or can be compelled to do so, in my opinion it would be wrong to give him part only of the property upon which the debts were secured.

Then we come to another point, a question which affects the priority of certain mortgages obtained by *Langley*. Apparently some of the fund was in the hands of trustees, but part of it was in Court. *Langley* never got any stop order. He gave notice to the trustees, but the Plaintiffs, the *Mutual Life Assurance Society* obtained a stop order before Mr. *Langley* did, although at the time when they obtained the stop order, as I understand, they had notice of the security prior to it.

Two points were made. It was said, first of all, if priority could be obtained by a stop order under ordinary circumstances, yet that in this case the Plaintiffs had notice of Mr. *Langley's* security at the time when they obtained a stop order, and that

C. A. 1886 MUTUAL LIFE ASSURANCE SOCIETY v. LANGLEY. Cotton, L.J.

prevents them from obtaining priority by the stop order. Now, in my opinion, upon principle that is wrong. It is not a question of what a man knows when he does that which will better or perfect his security, but what he knows at the time when he took his security and paid his money. The principle always has been this, if a man with ignorance of a previous incumbrance takes a mortgage or makes a purchase, when he finds out the truth he may take such steps as he can in order to protect his weak security or his weak purchase, and as here there was no notice at all to the Plaintiffs at the time they took their security, in my opinion upon principle they ought by their stop order, if it does give priority, to get that priority.

Two cases were quoted. One was the case of *In re Holmes* (1), before the Court of Appeal, where it was held by the Court of Appeal that where the incumbrancer who seeks to obtain priority by giving notice to the trustees, or by getting a stop order—it is immaterial which—had full notice of the first mortgage when he took his security from the owner of the equity of redemption, it would be inequitable that he should gain such priority. He takes his mortgage subject to the first mortgage, and by subsequently giving the first notice he ought not to be allowed, and it would be inequitable to allow him, to obtain any priority, because he had got from his assignor that which was, under the circumstances, to be considered as subject to the incumbrances of which he had notice, and he could not be allowed by this means to give priority. There was also a case of *Elder* v. *Maclean* (2), in which there is a short passage at the end of the judgment as it is reported, which apparently did give support to the contention; but although that passage is in the *Weekly Reporter* it is not to be found in the report in the *Jurist*, to which we have referred. Whether there is any inaccuracy in the report, or it was not argued, one can hardly tell; but if it was so laid down by Vice-Chancellor *Kindersley*, with the greatest respect for his care, intelligence, and knowledge of the law, I think it was erroneous, as laying down a wrong principle.

But then it was said, independently of that, that the notice given by *Langley* was sufficient, and that the stop order did not

(1) 29 Ch. D. 786. (2) 5 W. R. 447; 3 Jur. (N.S.) 283.

give priority to the Plaintiffs as against that notice to the trustees. Now it was conceded by Mr. *Karslake*, and it has been the long established practice of the Court, and has been laid down in many cases, that if the whole fund was in Court then a stop order was the effectual way of gaining priority, and preventing any subsequent incumbrancer getting priority over the person who obtained the stop order. But it is said there was a difference where part only of the fund was in Court, and the rest still in the hands of the trustees. On principle I am unable to see that. Where a fund is carried to a separate account, no doubt the trustees need not be served, but where funds are standing to the general credit of the action, the trustees are served. It is their duty to tell the Court of such notices as they have received, and to give the Court such information as may be right in order to enable it properly to dispose of the fund. They are still trustees, although they have parted with the fund over which they are trustees. They are trustees in the sense that they have still a duty towards the Court, and they will be served when any application is made for payment of the fund out. How does the matter differ when part of the fund is in Court? I do not see that it differs at all. If it is not standing to a separate account, they will still come and inform the Court. They would not do so any more if the whole fund was in Court. The true principle is this. One ought to consider how will notice be effectually given so as to prevent the fund which is being dealt with being improperly dealt with? As regards the fund in Court, of which I will not call the Court a trustee, but which the Court has control and custody of, there the proper mode of giving effectual notice, and the best mode, is to obtain a stop order. As regards the fund still in the hands of the trustees, the most effective mode is giving notice to the trustees. In my opinion it would be wrong to say there is a difference in such a case as this between a part and the whole of the fund being in Court. If there were a trust and there were two sets of trustees, of course you must give notice to both; and even if the parties have not the fund but have got some duty to perform respecting it, notice to them would not be effectual. Various cases were referred to. There was one which was much relied upon, also before Vice-

C. A. 1886 MUTUAL LIFE ASSURANCE SOCIETY v. LANGLEY. Cotton, L.J.

Chancellor *Kindersley*, and that was the case of *Thompson* v. *Tomkins* (1). There, although the Vice-Chancellor does not refer to the point, it was really not a question of priority of incumbrancers, but a question as to whether or not the property was in the order and disposition of the bankrupt. It was contended, from what was said by Lord *Eldon* in the case of *Loveridge* v. *Cooper* (2), that the same principle must apply to both subjects. But it cannot be said that it will apply in all respects when one considers what the rule of law is as regards order and disposition. Order and disposition must be with the consent of the true owner, and it may very well be that sufficient has been done to shew that the true owner does not consent to the fund remaining as it is, although it would not be sufficient to shew that notice had been given to effectually secure or obtain priority.

On this point, therefore, I am of opinion that the appeal must fail; on the other point the minutes must be varied.

BOWEN, L.J.:—

As to the first point mentioned by the Lord Justice, it seems to me that the case really is to be decided upon the simple principle that Mr. *Langley's* rights ought to be looked at as they existed in 1872. The fact is, the mortgagor could not himself subsequently by dealing with the equity of redemption do anything to prejudice the Defendant's right, nor can the Plaintiffs themselves do anything by subsequent acts to prejudice it. It is a case in which the decision to which the Lord Justice has just come to, and in which I agree, is not inconsistent with the views and the language of the House of Lords, the Court of Appeal, and Lord Justice *Fry* in the cases of *Mills* v. *Jennings* (3), and *Jennings* v. *Jordan* (4), and *Harter* v. *Colman* (5). Upon that point, therefore, I think the appeal ought to succeed.

Two further points were made by Mr. *Karslake*. In the first place he says, that this fund in question being partly in Court, the notice which was given to the trustees by Mr. *Langley* is sufficient to prevent the subsequent order obtained by the

(1) 2 Dr. & Sm. 8.
(2) 3 Russ. 1.
(3) 13 Ch. D. 639.
(4) 6 App. Cas. 698.
(5) 19 Ch. D. 630.

Plaintiffs from having priority. It is not disputed that where the whole of the fund is in Court, you must obtain a stop order if you wish to have priority. But he says that there is a distinction where part of the fund only is in Court, and where the remainder is remaining with the trustees. It seems to me impossible to see any principle upon which such a distinction can be made. The doctrine upon which notice is necessary to complete the title, is a branch of the broad rule that you must do your best to perfect the transfer of possession, and the notice really goes as far towards equitable possession as you can go, because you affect with notice the person who has actual control of the fund. In order to go as far as you can towards equitable possession, you must direct your steps straight to the person in whose hands the fund is. He is the person who has obtained the control of it, and he is the person who alone ought to be dealt with as far as notice is concerned. If you have two sets of funds in the hands of two sets of persons, notice to one set is not sufficient notice to both. You must give notice to both. If you only give notice to one set, you have only given notice to those who are in possession of part. When you apply that reasoning to money paid into Court by the trustee, it is perfectly clear that as soon as the trustee has parted with the dominion and control of part of the fund—as soon as the fund is partly in Court—then the trustee has ceased to have control and dominion over the whole of it—he is no longer the person who has the control and dominion over the part that is in Court. It may be an inaccurate expression to say that the Court is trustee, or that the trustee ceased to be trustee when the money was paid into Court. He has no longer that sort of dominion over it which makes giving notice to him the best step to be taken towards equitable possession. The case of *Thompson* v. *Tomkins* (1) ought to be distinguished upon the ground on which the Lord Justice has put it.

There is only one word that I wish to add with regard to the next point. It is said that the *Mutual Life Assurance Society* at the time of obtaining the stop order had notice of Mr. *Langley's* incumbrance. It would be introducing a per-

(1) 2 Dr. & Sm. 8.

C. A. 1886 MUTUAL LIFE ASSURANCE SOCIETY v. LANGLEY. Bowen, L.J.

fectly new doctrine, to lay down that notice at the date of the stop order was a material point to consider. The time of the advance is the time to look to, and if it were not so, it would be impossible for the inquiries to be framed as they are now. *In re Holmes* (1) decides nothing more than this, that you cannot by getting a stop order, obtain a right which was unjust and contrary to the principles of equity to obtain. The passage which was referred to by Mr. *Karslake* in the case of *Elder* v. *Maclean* (2) is not to be found either in the *Jurist* or in any of the regular constituted reports, and I do not think it can be relied upon absolutely.

FRY, L.J.:—

I am of the same opinion upon both points.

With regard to the first point, it appears to me that the Plaintiffs can obtain no better rights for their mortgage of 1876 than the mortgagor himself had at that time. Now how do the facts stand at that time? At that time the mortgagor had not only mortgaged to the five earlier mortgagees from whom an assignment has been taken by the Plaintiffs, but he had mortgaged to the Defendant *Langley*. He had mortgaged to *Langley* the reversionary property, and that placed *Langley* in this position. He was liable to have his interest in that property foreclosed, by the prior mortgagees, who were for the most part mortgagees not only of the reversionary interest in the property but of the life-interest of the mortgagor; and, by parity of reasoning, he had a right to redeem both those sets and take an assignment of both those properties upon paying off the prior mortgages. It appears to me that the mortgagor had no power to create any interest which would interfere with or infringe that right of *Langley*, and further, that if the Respondents' contention were to prevail it would follow, as they admit it does follow, that *Langley* would be deprived on payment off of the prior mortgages of part of the security, and he would only be entitled to take an assignment of the reversionary property; and payment off of the prior mortgages would enure for the benefit of the subsequent mortgagee, and make him the first mortgagee of the life interest. That

(1) 29 Ch. D. 786. (2) 5 W. R. 447.

would be a very startling conclusion, and I think it is only based upon a line of argument that is inconsistent with the rights of the parties, because the mortgagor was unable to place the Plaintiffs in any better position than he himself was in. He could not interfere with *Langley's* right, and therefore his subsequent mortgagees cannot interfere with his right.

With regard to the second point, that is subdivided into two, and the first question is this, whether the stop order obtained ceases to have operation by reason of the fact that the person who obtained that stop order had notice of the prior incumbrances. Now I agree with what has been said by my learned Brethren, that the crucial point as to notice is not the time of the stop order, or the giving of the notice, but the time of parting with the money and taking the security. A person who without any notice of the prior incumbrances takes the security, is at liberty, notwithstanding subsequent notice, to perfect that security which he has taken, either by notice to somebody else or by what is equivalent to it—obtaining a stop order. If we were to give way to the argument that has been addressed to us upon that point, we should be introducing an entirely new class of inquiries. We should have to inquire in cases of security depending upon notice, first, whether the mortgagee took with notice of the prior incumbrance, and, secondly, whether he gave his notice to the trustee or the other persons before he received notice of the prior incumbrance. That is not, in my opinion, the practice of the Court.

The second question is this, whether notice to the trustees was sufficient, although no stop order was obtained. I think the true inquiry when notice has been given or a stop order has been obtained, is, Where is the money? in whose hands is it? under whose control is it? And in order to approach as near as you can to obtaining possession of the fund, you must go to those persons in whose hands the money is or under whose control the money is. You must give to them notice of your claim. It follows, therefore, that if the entirety of the fund in question at the time when the security is to be perfected is in Court, you must go to the Court and do that which is the only means of giving effect to your security before the Court, namely, obtain a

C. A. 1886 MUTUAL LIFE ASSURANCE SOCIETY v. LANGLEY.

stop order. If the entirety of the fund is in the hands of one set of trustees you must give notice to that set of trustees, and if part of the money is in Court and part in the hands of the trustees, then you must obtain your stop order, and you must give notice to the trustees. I think, therefore, that notice to the trustees cannot prevail. The minutes will be varied in the manner proposed. With regard to the costs, I think that no costs should be given on either side.

1886. Jan. 26. The case was on this day again mentioned, with respect to the form of the decree for redemption of the several mortgages, and as to the costs.

*Cozens-Hardy*, Q.C., and *Farwell*, for the Plaintiffs, contended that as *Langley* gave no notice to the trustees of his two mortgages in 1874 and 1878, on the *Lyne Stephens* reversion, and the Plaintiffs did give notice to the trustees of their five mortgages of 1876, 1877, 1878, and 1879, on the life interests, the Defendant had lost all priority over those five mortgages. Therefore in settling the order of redemption of both properties, the Plaintiffs ought to have priority over those two mortgages of the Defendant.

*W. W. Karslake*, Q.C., *A. G. Langley*, and *Druce*, for the Defendant *Langley*, were not called on.

COTTON, L.J.:—

I think it would be carrying the principle of notice in order to gain priority too far. It is not as if the *Mutual Society* had any mortgage on the reversion subsequent to the mortgage of the reversion of which no notice has been given, but we held that a person who redeemed all the debts due to a previous mortgagee was entitled to have all the securities which he had for his debt handed over to him. Priority is only gained as regards the particular fund as to which notice was given. In my opinion the contention of the Plaintiffs fails.

BOWEN and FRY, L.JJ., concurred.

*Cozens-Hardy*, Q.C., and *Farwell*, for the Plaintiffs, then contended that although the Plaintiffs, in the events that had happened, had become first, third, and fifth mortgagees, the fifth being the last mortgage, they ought not to pay all the costs of the action as last mortgagees, but only the costs from the time when they became actors as fifth mortgagees, that is, after the amount due on the previous mortgages had been ascertained.

*W. W. Karslake*, Q.C., *A. G. Langley*, and *Druce*, for the Defendant *Langley*.

COTTON, L.J.:—

The point is certainly a curious one; but, in my opinion, if the *Mutual Society* does not redeem in respect of the fifth mortgage, then they must pay the costs; because they came here insisting upon all these mortgages. It turns out that their position was that of first, third and fifth mortgagees, and when you get down to No. 4, the Defendant having all the mortgages vested in him by having redeemed them, then if the fifth mortgagees fail to redeem, their action fails ultimately, and they must pay the costs. There will be three months allowed for each of the redemptions after the first.

BOWEN, L.J.:—

I am of the same opinion.

FRY, L.J.:—

I agree.

---

The minutes of decree which were settled by the parties, so far as they are important to this report, were to the following effect:—

The Defendant *Langley*, waiving his partial priority over the mortgage security of *Pym* and *Nicolle*, of the 27th February, 1878, direct:

1. An account of the amount due to the Plaintiffs by virtue of all the securities comprised in their deed of transfer of the 17th of December, 1880, and taxation of costs; and order Defendant *Langley* or the three remaining Defendants to redeem within six months.

C. A.
1886
MUTUAL LIFE ASSURANCE SOCIETY v. LANGLEY.

Direct if Defendant *Langley* redeem, the following account:

2. An account of what is due to *Langley* under and by virtue of his security of the 28th of May, 1872, and his security of the 27th of August, 1874, including the amount so paid by *Langley* to the Plaintiffs for redemption, and his costs to be taxed on the higher scale, and the amount due to *Langley* to be certified.

Order that, upon the Plaintiffs and the last named Defendants, or any of them, paying to Defendant *Langley* on such day as shall be named in the said certificate, the amounts which shall be certified to be due on taking such last-mentioned account, the Defendant *Langley* do assign the premises which shall have been redeemed by him to the Plaintiffs and the said other Defendants, or such of them as shall so redeem him; but in default of payment as aforesaid by the Plaintiffs

Dismiss the action against the Defendant *Langley* with costs; and in default of payment by the said remaining Defendants the said remaining Defendants to be absolutely foreclosed of the said premises.

If the Plaintiffs shall redeem the Defendant *Langley*, take the following account:—

3. Compute subsequent interest on what Plaintiffs shall have paid to *Langley*, and take an account what is due to Plaintiffs under their securities of the 22nd of August, 1876, 15th of June, 1877, and 7th of March, 1878, and tax their subsequent costs, and let the total amount be certified.

Order that on payment to Plaintiffs within three months, &c., by *Langley* or the said other Defendants what shall be found due to Plaintiffs on account No. 2, Plaintiffs assign the premises to the redeeming Defendants.

In default foreclosure.

If Defendant *Langley* redeem the Plaintiffs, take the following account:—

4. Compute subsequent interest on what *Langley* shall have paid to Plaintiffs, and take account of what is due under his security of the 7th of July, 1878.

Order Plaintiffs and the said other Defendants to redeem Defendant *Langley*.

In default dismiss action against *Langley* with costs, and foreclose the other Defendants.

If Plaintiffs redeem *Langley*, take the following account:—

5. Compute subsequent interest on what Plaintiffs shall have paid to *Langley*, and take an account of what is due to Plaintiffs under securities of the 21st of August, and 28th of October, 1879.

Order the other Defendants to redeem the Plaintiffs, or foreclosure.

No costs of appeal. Liberty to apply.

The Plaintiffs and the Defendant *Langley* afterwards came to a settlement, and the decree was never drawn up.

Solicitors: *Burchell & Co.; Hores & Pattisson.*

M. W.

## NORTH CENTRAL WAGON COMPANY *v.* MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY COMPANY.

V.-C. B.
1886
*March* 8, 9, 10.

[1885 N. 520.]

*Chattels—Railway Wagons—Sale and re-letting—Hiring Agreement—Option of Purchase—Loan Transaction—Bill of Sale—Railway Company—Use of Railway—Supply of Locomotive Power—"Tolls"—Carriers' Charges—Lien—Bills of Sale Act* (1878) *Amendment Act*, 1882, *s.* 9—*Railways Clauses Consolidation Act*, 1845, *ss.* 3, 97 [*Revised Ed. Statutes, vol. ix., pp.* 704, 730].

The *B.* company, a colliery company, being in want of money, applied for assistance to the Plaintiffs, a wagon company. After some negotiations, the Plaintiffs paid to or on behalf of the *B.* company, £1000, for which the Plaintiffs took receipts and an invoice describing the £1000 as the purchase-money for 100 railway wagons.

Simultaneously the *B.* company and the Plaintiffs executed an agreement by which the Plaintiffs let the 100 wagons to the *B.* company for three years at a rent payable quarterly, the total rent for the three years amounting to a sum representing £1000 and interest thereon at £7 per cent. per annum. By the agreement the Plaintiffs were authorized, in case of a quarter's rent being in arrear for seven days, to seize the wagons and put an end to the agreement; and option was given to the *B.* company of purchasing the wagons at the end of the term for a nominal sum. The wagons bore the "name-plates" of both companies. The *B.* company then proceeded to send coal from their colliery to their customers in these wagons over the railway of the Defendants, a railway company, who sent in monthly accounts to the *B.* company, charging against each wagon-load a sum for "carriage," made up of a charge (as authorized by the Defendants' special Act) for the use of the railway and an additional charge for the supply of locomotive power.

The *B.* company having become insolvent, and a sum being due to the Defendants on the monthly accounts, the Defendants detained nine of the wagons then on their line, claiming to have a lien on them for the unpaid "tolls" under sect. 97 of the *Railways Clauses Consolidation Act*, 1845.

Two quarters' rent being in arrear under the agreement, the Plaintiffs seized such of the 100 wagons as they could obtain possession of, and brought an action against the Defendants for the delivery up of the nine in their possession.

Action dismissed with costs, on the ground (1) That the transaction carried out by the agreement was, in substance, a loan, and that the agreement, receipts and invoice, constituted a "bill of sale" within the meaning of the *Bills of Sale Act* (1878) *Amendment Act*, 1882; and that, as these

V.-C. B.

1886

NORTH CENTRAL WAGON COMPANY v. MANCHESTER, SHEFFIELD AND LINCOLNSHIRE RAILWAY CO.

documents were not registered and not in the form prescribed by sect. 9, the transaction was void: and (2), that the sum due from the *B.* company to the Defendants for the use of the railway and the supply of locomotive power, constituted "tolls" for which the Defendants were entitled to a lien under sect 97 of the *Railways Clauses Act.*

IN the month of February, 1884, certain persons trading under the name of the "*Blacker Main Colliery Company*," being in want of money, applied for assistance to the Plaintiffs, the *North Central Wagon Company.* A correspondence then took place between the two companies, from which it appeared that £1000, being the amount required by the *Blacker Company*, was to be found by the *North Central Company* through the *Blacker Company* "financing" 100 railway wagons belonging to the latter company for three years for that sum with interest at 7 per cent. per annum. To carry out the arrangement, an agreement—which was in a printed form said to be commonly adopted by companies dealing in railway wagons or other rolling stock, and was indorsed as an "agreement for hire"—was entered into on the 18th of February, 1884, between the *North Central Company* of the one part, and the several persons trading as the *Blacker Company*, thereinafter called "the tenants," of the other part, whereby (1), the *North Central Company* agreed to let and the tenants agreed to hire 100 railway coal wagons then in their possession, and numbered respectively with *Sheffield Wagon Company's* plates, 8675 to 8774, and in paint, 1 to 100, from the 1st of March, 1884, for the term of three years certain: (2), that the rental should be £372 10*s.*, payable to the company by the tenants by quarterly payments, the first quarterly payment to be made on the 1st of June then next: (3), that four quarterly payments of £93 2*s.* 6*d.* should be made to the company in each year for the full term of three years: (4), that in case the said rent or any part thereof should remain unpaid at the expiration of seven days after the same should become due the tenants should pay interest thereon at 10 per cent. per annum up to the day of payment, but that the payment of such interest should not prejudice the claim or powers of recovery of such rent therein contained: (7), that the tenants should do or bear the cost of all repairs, maintenance, and painting to the wagons: (10), that

during the tenancy the name, number, and plate of the *North Central Company* should be fixed and retained upon each wagon "for the purpose of making the ownership publicly known:" (12), that "at the expiration of the said tenancy" the tenants should forthwith deliver up the wagons to the company in good order unless "purchased" by the tenant under clause 15: "(13). Whenever the said rents hereinbefore made payable or any part thereof, shall be in arrear for seven days next after the days appointed for payment as aforesaid, it shall be lawful for the said *North Central Wagon Company* immediately thereupon, or at any time or times thereafter, whilst any such arrear exists, to enter upon any land or premises of the tenants, and then and there, and also at any other place or places, to seize the said wagons or any of them; and do all such acts and exercise all such powers, rights, and remedies for satisfying the same arrears, and the cost of and incident to the same distress, as landlords may do and exercise in cases of distress for rent on leases for years": (14), that if the said rents should be in arrear for seven days, "the same having been demanded by letter in writing," or if the tenants should not exercise the option of purchasing the wagons at the end of the term and pay the purchase-money as thereafter provided by clause 15; or if the tenants should part with the possession of the wagons without the consent of the company, or should suffer the company's name-plate to be removed or defaced, or should become bankrupt, or make any assignment for the benefit of creditors, or if the wagons should become liable to be taken in execution, "then, and in any or either of the said cases, it shall be lawful for the said *North Central Wagon Company*, or their agent for the time being, at any time or times thereafter, at any place or places, to seize, remove and take away the said wagons, and the same to have again, repossess and enjoy as in their former estate, and this agreement shall thereupon be held to have been broken and put an end to by the said tenants, and shall accordingly cease and determine, and the said tenants shall forfeit all interest in the said wagons; and the rent of the said wagons shall be considered and be taken to be due and become payable for any fractional part of a quarter from the then last preceding day of payment up to the date of the seizure and taking possession thereof. . . . .

V.-C. B. 1886 NORTH CENTRAL WAGON COMPANY v. MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY CO.

And such termination of this agreement shall not extinguish any rent or sums of money hereinbefore made payable which may be then due, and shall not prejudice any right or cause of action, or other remedy of the said *North Central Wagon Company*, for the recovery of any such rent, or for any breach or non-performance of any of the conditions or agreements herein contained, and on the part of the said tenants to be observed and performed, anything hereinbefore contained to the contrary notwithstanding. (15) And it is hereby agreed that the several quarterly payments hereinbefore made payable for the said term of three years, and the interest which may have accrued thereon respectively, and all other sums hereinbefore made payable having been fully paid to the *North Central Wagon Company* for the full period of three years; and all the conditions and agreements herein contained, on the part of the tenants having been observed and performed then the tenants shall have the option of purchasing all or any of the said wagons in consideration of the sum of 1*s.* for each and every wagon, in number, being paid by the tenants to the said *North Central Wagon Company* within fourteen days after the expiration of the said term of three years."

On the following day the *North Central Company*, at the request of the *Blacker Company*, posted a cheque for £257 to the *Sheffield Wagon Company*, the original owners of the wagons, in discharge of a claim by that company on the *Blacker Company* under a "lease" of the wagons to the latter company, and also a cheque for £743, being the balance of the £1000, to the *Blacker Company*, who handed to the *North Central Company* in exchange the following "invoice":—

"*Blacker Main Colliery*,
nr. *Barnsley*, Feby. 18, 1884.

"Messrs.
The *North Central Wagon Co.*,
*Rotherham.*

"Dr.
To the
*Blacker Main Coal Co.*

"1884, Feby. 18. } To 100 wagons, Nos 1 to 100, and bearing *Sheffield Wagon Coy's*

plates, Nos. 8675 to 8774, and marked 'The *Blacker Main Coal Company, Barnsley*' . . £1000 0 0

"Cr.

"Feby. 19. By cheque payable to *Sheffield Wagon Co.* . . . . . 257 0 0

£743 0 0"

The *Sheffield Wagon Company* and the *Blacker Company* duly sent receipts for the £257 and the £743 to the *North Central Company*. The receipt for the £257 was as follows:—

"Received this 26th Feby., 1884, from Messrs. the *North Central Company* the sum of £257 for redemption of 100 wagons, Nos. 8675/8774 leased to the *Blacker Main Coal Company*.

"*per pro. Sheffield Wagon Company, Ld.*
"*Sidney Oxley*, Secretary."

"£257 0*s.* 0*d.*"

The receipt for the £743 was as follows:—

"*Blacker Main Colliery*,
nr. *Barnsley*, 20th Feby., 1884.

"Received of the *North Central Wagon Company* cheque value £743, which is placed to your credit with thanks.

"*p. pro.* The *Blacker Main Coal Co.*
"*John Mallison.*"

"£743 0*s.* 0*d.*"

The "name-plates" of the *Sheffield Wagon Company* were then removed from the wagons, and those of the *North Central Company* substituted. The wagons also bore the name-plates of the *Blacker Company*, and the plates of both companies remained on the wagons up to the commencement of the present action.

Subsequently to the transactions above-mentioned, the *Blacker Company*, whose colliery was connected with the railway of the Defendant company by a siding, proceeded to send coal in the 100 wagons comprised in the agreement, from their colliery over the siding, and so on to the Defendants' railway for transit to their destination, the locomotive power being supplied by the railway company, who sent their engines for the purpose on to the

V.-C. B.
1886
NORTH CENTRAL WAGON COMPANY v. MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY CO.

siding. Each wagon bore a label stating its destination and the name of the person to whom the contents were consigned: and before any wagon-load was despatched the *Blacker Company* sent to the railway company a consignment note stating the destination of the load, its weight, and the number of the wagon. Monthly accounts were rendered by the railway company of their charges against the *Blacker Company*, these accounts being made up from the consignment notes. Each account so rendered was headed "For carriage of coal and coke as under": then, in separate columns, were the date of consignment of each load, the place of departure, the place of destination, the number of the wagon, the weight of the load, the "rate" per ton, and the total sum chargeable for the load; but no charge was expressed to be made in respect of the *Blacker Company's* wagons themselves, the charge purporting to be only in respect of the coal and coke carried in them. The accounts so rendered were duly paid by the *Blacker Company* up to the end of September, 1884.

On the 6th of February, 1885, the *Blacker Company*, having got into financial difficulties, issued a circular calling a meeting of their creditors, whereupon, in the same month, the railway company, to whom money was due from the *Blacker Company* on accounts rendered from the previous September to the end of January, gave orders to their servants to detain the wagons standing on their line, and not to allow them to return to the *Blacker Company's* premises. In consequence of the *Blacker Company* having made default in payment of the quarter's rent due under the agreement on the 1st of December, 1884, the *North Central Company's* secretary, *Edwin Ball*, on the 25th of February, 1885, wrote them a letter demanding payment of the "rent and interest," and giving them notice that, failing payment in seven days, clauses 13 and 14 of the agreement would be enforced, the wagons taken possession of, and the agreement put an end to.

The rent was not paid, and on the 1st of March, 1885, a second quarter's rent became due. *Ball* then wrote to the *Blacker Company* demanding payment of £187 5*s.* for the two quarters' rent, in reply to which the *Blacker Company* sent the *North Central Company* a cheque for the amount, but the cheque was, on presentation, dishonoured. Thereupon, on the 18th of March, 1885, *Ball*

again wrote to the *Blacker Company* threatening, unless the amount was paid forthwith, to take possession of the wagons and cancel the agreement. On the following day, the 19th of March, *Ball* sent to the *Blacker Company* a formal notice demanding payment of the £187 5*s.* by the 23rd of March, and stating that in case of default, clauses 13 and 14 of the agreement would be put into operation, the wagons taken possession of, and the agreement terminated.

The money not being paid on the appointed day, Mr. *Ball*, on the 28th of March, 1885, wrote to the manager of the Defendant company, requesting that certain wagons standing on the Defendants' line, being nine of the wagons comprised in the agreement, should be forwarded to the *North Central Company's* works at *Masborough*, on the *Midland Railway*, and offering to pay the carriage. In reply, Mr. *Pollitt*, the accountant to the Defendant company wrote on the 30th of March, informing *Ball* that the wagons "are being detained by the company in pursuance of the 97th section of the *Railways Clauses Act*, 1845, in respect of certain tolls due to the company amounting to £237 7*s.* 10*d.* Upon receipt of payment of this sum, together with the expenses of such detention, the wagons will be then handed over to the persons entitled thereto. In the meantime I am quite unable to recognise the *North Central Wagon Company* as being such persons, or to act upon their instructions in the matter." *Ball* thereupon, on the 1st of April, 1885 wrote to *Pollitt* demanding "possession of the wagons which are our property, and not that of the *Blacker Company*," and disputing the Defendants' right to detain them. Some further correspondence then ensued between *Ball* and *Pollitt*, in the course of which the latter stated that his company had been advised that the "hire agreement" between the *North Central Company* and the *Blacker Company* was void, on the ground that it was in reality a security for payment of money, and should therefore have been registered as a bill of sale. The Defendants declining to deliver up the wagons, and the two quarters' rent under the agreement still remaining due from the *Blacker Company*, the *North Central Company* on the 10th of April, 1885, sent the *Blacker Company* a formal notice in writing determining the agreement, and informing them that possession had been taken of such

V.-C. B.
1886
NORTH CENTRAL WAGON COMPANY v. MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY CO.

of the wagons comprised in the agreement as were accessible, and demanding possession of the nine wagons in question, "and that we shall hold you responsible for their full value and the hire thereof from this date until they are actually placed in our possession." The *North Central Company* did, in fact, seize such of the wagons as were under their control, but were unable to take possession of the nine wagons above-mentioned in consequence of the Defendants' claim to a lien upon them. Accordingly, the *North Central Company* then brought this action against the Defendants, the railway company, claiming that the Defendants might be ordered to deliver up the nine wagons to the Plaintiffs, they, the Plaintiffs, thereby offering to pay all proper charges of the Defendants for the carriage and delivery thereof to the Plaintiffs, and damages.

The statement of claim alleged that each of the nine wagons had, at the time they came into the Defendants' possession, and still had, a distinguishing metal name-plate affixed thereto shewing that the Plaintiffs were the owners thereof, and other distinguishing marks shewing the ownership of the Plaintiffs, and that the Defendants had full notice of the Plaintiffs' ownership, and of the *Blacker Company* having no interest therein except such as they had under the agreement: that the sums claimed by the Defendants, amounting to £237 7*s.* 10*d.*, were claimed in respect of services rendered by the Defendants as carriers, and were not tolls in respect of which an express lien was given by sect. 97 of the *Railways Clauses Consolidation Act*, 1845: moreover, that if any part of the said sums were tolls or sums in respect whereof the Defendants had any lien as against the *Blacker Company* under the said section or otherwise, the said wagons did not belong to the *Blacker Company* so as to be available for such lien: that the Plaintiffs had offered, and thereby offered (and the offer was proved by the correspondence), notwithstanding their right of forfeiture under the agreement, to permit the Defendants, for the purposes of any lien, to avail themselves of the interest which the *Blacker Company* had under the agreement at the time of the forfeiture, the Defendants making all payments and performing all obligations under the agreement in the place of the *Blacker Company*, but that the Defendants had refused the offer: and

while offering to pay to the Defendants the proper charges for the carriage and delivery to them, the Plaintiffs, of the nine wagons, they, the Plaintiffs, submitted that the Defendants had no general lien except under the said 97th section, or by special agreement, and that such general lien (if any) was only a lien on the interest of the *Blacker Company* under the agreement; and the Plaintiffs further alleged that the £237 7*s.* 10*d.* was in fact claimed by the Defendants entirely for past services before the wagons were delivered to the Defendants for the purposes of the transit during which they were seized by the Defendants, and that the Plaintiffs were entitled to delivery of the wagons without payment of the £237 7*s.* 10*d.*, or any part thereof.

By their defence the Defendants denied that any of the nine wagons in question were the property of the Plaintiffs; and they admitted the detention of the wagons under the said 97th section for "tolls" due to them from the *Blacker Company* "on and before the 18th of March, 1885," first, in respect of certain "carriages," namely, the said nine wagons, and secondly, in respect of "certain carriages and goods" which had been removed from the Defendants' premises before the nine wagons were within such premises. The rest of the allegations in the statement of claim the Defendants denied.

*Ball*, the Plaintiffs' secretary, deposed, in answer to interrogatories, that the nine wagons were acquired by the Plaintiffs by purchase from the *Sheffield Wagon Company, Limited*, and the *Blacker Company* in February, 1884: that the Plaintiffs purchased the owners' interest of the former company and the tenants' interest of the latter company: that the Plaintiffs acquired the wagons by delivery to them as purchasers, and thereupon affixed their owners' plates thereto for the purpose of shewing that the wagons belonged to them, and for obtaining the protection given by the *Railway Rolling Stock Protection Act*, 1872: that they did not at any time advance any sum of money to the *Blacker Company* upon a mortgage or otherwise upon the security of any wagons, but "purchased the interest of the *Sheffield Wagon Company, Limited*, and of the *Blacker Company* in 100 wagons (including the said nine wagons) and then leased the said wagons to the *Blacker Company*:" that the nine wagons, until early in February, 1884,

V.-C. B.
1886
NORTH CENTRAL WAGON COMPANY v. MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY CO.

"belonged to the *Sheffield Wagon Company* as owners, and to the *Blacker Company* as lessees under a purchase lease": that the interest of the *Blacker Company* therein having become forfeited, or liable to forfeiture to their lessors, the *Sheffield Wagon Company*, "by arrangement with the Plaintiffs and the *Sheffield Wagon Company*, the latter company and the *Blacker Company* transferred their property in the said wagons to the Plaintiffs by delivering the same to the Plaintiffs and receiving the purchase-money for the same about the 18th of February, 1884, and the *Blacker Company* subsequently became the Plaintiffs' lessees of the said wagons" as mentioned in the statement of claim.

The Defendants, by "admissions," admitted that payment of the transit of the nine wagons to the Plaintiffs' works had been tendered by the Plaintiffs: also that the Plaintiffs' name-plates were on the wagons when the Defendants took possession of them.

Issue having been joined, the action now came on for trial.

The pleadings did not directly impeach the validity of the agreement of the 18th of February, 1884, on the ground of its being an unregistered bill of sale, but the question was raised and argued at the trial by the Defendants' counsel.

To shew the nature of the agreement the previous correspondence between *Oxley*, the secretary of the *Sheffield Wagon Company*, *Ball*, the secretary of the *North Central Company*, and *Malleson*, the late manager of the *Blacker Company*, was put in. Some of the letters spoke of "financing" the wagons for three years, and of "the rate (7 per cent.) of interest on the transaction"; another of the *Blacker Company* "wanting £1000 upon 100 wagons"; on the other hand, the letter from the *North Central Company* to the *Blacker Company* enclosing the cheque for £743, spoke of that sum as "being balance of purchase of 100 wagons." The invoice and receipts above-mentioned were also put in.

Messrs. *Ball* and *Malleson* were both examined.

The former deposed, in cross-examination, that the business of his company was to buy, sell, and let wagons, though when they bought wagons and let them to a customer they did not expect to see them again, and, in fact, preferred to have the money and let the customers keep the wagons: that the transaction effected

by the agreement was a purchase and agreement for re-hire, carrying out "financing or redemption terms" in accordance with the almost universal custom in connection with the use of wagons: that the "rental" was intended to cover about 7 per cent. interest on the purchase-money, and that the object of the agreement was to reserve a right over the wagons "as security for" the repayment of the principal sum and interest.

*Malleson*, in cross-examination, admitted that his company adopted the transaction "as a mode of raising money," and that the so-called "rent" was so calculated as to repay the £1000 with 7 per cent. interest. He also admitted, in the course of re-examination, that in the *Blacker Company's* books the £1000 was placed on the credit side of the account, and the payments made to the *North Central Company* were placed on the debtor side.

Upon the question of the tolls in respect of which the Defendants claimed a lien on the nine wagons, the correspondence on that point above referred to was put in: also the monthly accounts above-mentioned, together with an account prepared in the accountant's department of the Defendant company since the commencement of the action, shewing the tolls claimed to be due in respect of the nine wagons in question, this account having been made out from the larger monthly accounts, which covered other wagons than the nine in question. This latter account shewed a total sum of £25 11*s.* as due for tolls in respect of the nine wagons, and a copy of it was sent to the Plaintiffs by the Defendants, but subsequently to the issue of the writ. The monthly accounts were made out in the usual way from the rate-book required to be kept by railway companies, the rates or tolls chargeable by the Defendants being exhibited on a board as required by sect. 93 of the *Railways Clauses Consolidation Act*, 1845. The Defendants' evidence also shewed that the tolls charged in the accounts did not include any terminal charges, but only charges for carriage and haulage over their line. The special Act under which the Defendants carried on their undertaking was the *South Yorkshire and River Dun Company's Act*, 1864. Sect. 13 of that Act specified the "rates, tolls, or charges" they were entitled to demand and receive "in respect of the use of the railway;" the last clause of the section being, "For all coal, culm, and charcoal

V.-C. B.
1886
NORTH CENTRAL WAGON COMPANY v. MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY CO.

the sum of five-eighths of a penny per ton per mile for the use of the railway, and if conveyed in wagons or trucks provided by the company, an additional sum per ton per mile not exceeding a farthing, and if drawn or propelled by engines, or other power provided by the company, an additional sum per mile. . . ." It also appeared from the evidence that during the correspondence in which the Defendants were asserting their right to a lien for the £237 7*s.* 10*d.*, an interview took place upon the subject between *Ball* and the solicitor and accountant to the Defendants, and that a lien was claimed on behalf of the Defendants, but disputed by *Ball*, upon all the wagons in the possession of the Defendants, no proposal being then made for severing the claim as between the nine wagons and the remainder.

*Rigby*, Q.C., and *Phipson Beale*, for the Plaintiffs:—

The question raised by the pleadings is whether, under sect. 97 of the *Railways Clauses Consolidation Act*, 1845, the Defendants have a lien on these nine wagons in respect of the £237 7*s.* 10*d.* claimed to be due to them from the *Blacker Company* for tolls. The question turns upon the construction of the section (1). We submit that the section gives a railway company a lien only upon the particular property, carriages, or goods in respect of which the tolls have been earned. Thus, if tolls are due on a "carriage" the company may seize that carriage, or, in case of removal, any other carriages on the premises; if on "goods" they may seize all or any part of the goods; but they cannot seize a carriage for tolls due in respect of goods, or *vice versâ*. Now it is clear upon the evidence in the present case that the

(1) Sect. 97 of the *Railways Clauses Consolidation Act*, 1845, is as follows:—

"If, on demand, any person fail to pay the tolls due in respect of any carriage or goods, it shall be lawful for the company to detain and sell such carriage, or all or any part of such goods, or, if the same shall have been removed from the premises of the company, to detain and sell any other carriages or goods within such premises belonging to the party liable to pay such tolls, and out of the moneys arising from such sale to retain the tolls payable as aforesaid, and all charges and expenses of such detention and sale, rendering the overplus, if any, of the moneys arising by such sale, and such of the carriages or goods as shall remain unsold, to the person entitled thereto, or it shall be lawful for the company to recover any such tolls by action at law."

Defendants only levied tolls in respect of the "goods," *i.e.*, the coal carried, and that they levied none in respect of "carriages"; accordingly their right, if any, was against the goods only. Again, the carriages subject to the right of seizure for tolls must be carriages "belonging to the party liable to pay such tolls": but here the evidence shews that the wagons belonged to us, and not to the *Blacker Company*, the party said to be liable for the tolls.

Further, we say that the tolls claimed are not "tolls" at all within the meaning of the section. The section gives no lien upon goods for tolls and charges due to the company for other goods previously conveyed by them as carriers, but only for tolls previously due for the use of the line by persons conveying goods in their own carriages; it refers merely to the case of goods conveyed in the carriages of the owners, who bargain only for the use of the line: *Wallis* v. *London and South Western Railway Company* (1). That case, therefore, lays down that if the toll is, properly speaking, a toll for the use of the line, it is within the section: if it is, properly speaking, a charge as a common carrier's charge, as we submit this is, it is not. Then, before a seizure can be made under the section there must be a "demand" for the tolls, and such demand must be for a sum separately stated and not mixed up with other charges: *Field* v. *Newport Railway Company* (2). Here there was no such separate demand, for the charges were mixed up in general accounts. With regard to the agreement of the 18th of February, 1884, it is similar to that in *Yorkshire Railway Wagon Company* v. *Maclure* (3), where it was held that the transaction was not a borrowing of money but a *bonâ fide* sale and hiring of rolling-stock. That this was a *bonâ fide* sale is borne out by the evidence. Moreover, the fact that our name-plates were fixed on the nine wagons, pursuant to the *Railway Rolling Stock Protection Act*, 1872 (35 & 36 Vict. c. 50), is additional evidence that the wagons belonged to us. The wagons, therefore, being ours at the date of the agreement (subject to such interest as the *Blacker Company* had under the agreement) and marked as ours with our name-plates, the Defendants had no

(1) Law Rep. 5 Ex. 62. (2) 27 L. J. (Ex.) 396; 3 H. & N. 409.
(3) 19 Ch. D. 478; 21 Ch. D. 309.

V.-C. B. 1886

NORTH CENTRAL WAGON COMPANY v. MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY CO.

right to seize them for tolls due from the *Blacker Company*: their only lien was upon the interest of the *Blacker Company*.

*Henn Collins*, Q.C., and *C. A. Russell*, for the Defendants:—

First, we say this action is really a possessory action; it is a common law action of conversion and detinue; and to sustain such an action the Plaintiffs must not only have the right to the goods claimed, but the right to their possession. We submit that, upon the true construction of the agreement, the Plaintiffs are not in a position, as against a third party, to sue in a possessory action. This point turns upon clause 14 of the agreement, which lays down the conditions on which the Plaintiffs, the lessors of the wagons, shall be entitled to resume possession. The two rights thereby given are inconsistent. The Plaintiffs have a right to rent for the use of the wagons up to the time of resuming possession, and so long as they are receiving rent they are not entitled to possession: they are not in a position to sustain a possessory action of trespass or conversion against a third person, for their right of possession is suspended by the contract for rent. Then the Plaintiffs reserved a further and inconsistent right, namely, a right in certain events to seize: when they have seized, then the right to rent is gone; but, pending the seizure, their right to rent exists, and, as an incident, there is a right to possession in any person claiming through the tenant under the agreement.

Secondly, we submit that the evidence clearly shews the real transaction carried out by the agreement to have been one of loan, and that the agreement constituted in fact a security for money, requiring, therefore, as a condition for its validity, registration as a bill of sale under the *Bills of Sale Act* (1878) *Amendment Act*, 1882: *Ex parte Odell* (1). If it is said that this is not a bill of sale because there is no provision that the surplus proceeds of a sale are to be handed back to the debtor, the answer is that, the transaction being one of loan, the Court will read such a provision into the agreement. Again, this being a bill of sale, it is void under sect. 9 of the Act as not being in the required form.

(1) 10 Ch. D. 76.

Thirdly, with regard to the construction of section 97 of the *Railways Clauses Act*, we submit that the word "tolls" includes tolls for the haulage of goods in carriages over the line, and not merely tolls for the transit of carriages; for the word "toll" is defined by sect. 3 as including "any rate or charge or other payment payable under the special Act for any passenger, animal, carriage, goods, merchandise, articles, matters or things conveyed on the railway;" and what we have charged here is expressly authorised by sect. 13 of our special Act, the *South Yorkshire Railway and River Dun Company's Act*, 1864, our charge for carriage of the coal being made up of a toll "for the use of the railway," with an additional toll for haulage "by engines provided by" us. Thus the word "tolls," in s. 97 of the general Act, covers the carriage of goods in owner's wagons propelled by our own engines. Sects. 86 and 90 of the same Act deal with tolls chargeable by the company, and embrace the charges we have made here. In the second part of sect. 92, and in sects. 93, 94, and 95, the word "tolls" appears to be used in the narrower sense of tolls for the use of the railway; but in sect. 96 it is used in its wider sense, and in sect. 97 there is nothing in terms limiting it to its narrower sense. The language of the section is wide enough to apply to traffic of every kind over the line—to goods in owners' carriages, to passengers in their own carriages, or to goods in the company's carriages. *Wallis* v. *London and South Western Railway Company* (1) cannot be relied upon as an authority for the Plaintiffs' contention, as the point was not really argued; and even if the decision was right, it is a decision as to the lien of a carrier who has done a great deal more than we have done here. Moreover, that case has been dissented from by the Court of Session in *Scotland* in *Caledonian Railway Company* v. *Guild* (2), where the corresponding section (90) of the Scotch Act was considered. The distinction between the services incidental to the duty of a railway company as carriers, and the services incidental to conveyance is pointed out in *Hall & Co.* v. *London, Brighton, and South Coast Railway Company* (3). *Field* v. *Newport Railway Company* (4) is an authority in favour of our view

(1) Law Rep. 5 Ex. 62.
(2) 1 Court Sess. Cas., 4th Series, 198.
(3) 15 Q. B. D. 505.
(4) 27 L. J. (Ex.) 396; 3 H. & N. 409.

V.-C. B. 1886

NORTH CENTRAL WAGON COMPANY v. MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY CO.

of the meaning of the word "tolls." *Evershed* v. *London and North Western Railway Company* (1) also deals with this point.

Then as to the Plaintiffs' contention that we are debarred from asserting a lien for services done to the nine wagons, because we have claimed a larger lien for services done not merely to those wagons, but to others also, *Scarfe* v. *Morgan* (2) is an authority that a claim to retain for a general balance is not a waiver of a lien for one particular charge. We placed an embargo on these wagons in February, 1885, that is, before the Plaintiffs gave the *Blacker Company* notice of taking possession; so that at the time we asserted our lien the wagons "belonged to" that company, within the meaning of s. 97, their interest being that of bailees for hire, and the Plaintiffs having no right of ownership: *Bradley* v. *Copley* (3). In any view of the case we are entitled to a lien for the £25 11*s.* for services done to the nine wagons, and inasmuch as there was no tender of that sum before action brought, the Plaintiffs are not entitled to maintain their action.

*Phipson Beale*, in reply:—

With regard to the agreement, although the motive of the *Blacker Company* was to raise money, yet they put the transaction, as they were entitled to do, into the form of a sale and reletting, as the evidence shews, and the agreement was not a bill of sale at all.

As to our right to sue, *Cooper* v. *Willomatt* (4) is an authority in favour of our maintaining this action. As to the meaning of s. 97 of the *Railway Clauses Act*, *Wallis* v. *London and South Western Railway Company* (5) has never been overruled. [He also referred to *Aberdeen Commercial Company* v. *Great North of Scotland Railway Company* (6)].

BACON, V.C.:—

The claim made by the Plaintiffs is that, they being lessors under an agreement of certain wagons to the *Blacker Main Colliery Company*, the Defendants, the railway company, have wrongfully seized those wagons, and insist upon detaining them

(1) 3 Q. B. D. 134.
(2) 4 M. & W. 270.
(3) 1 C. B. 685.
(4) 1 C. B. 672.
(5) Law Rep. 5 Ex. 62.
(6) 3 Nev. & Mac. 205, 226.

for some tolls which they claim. The action is an action of *detinue* clear and plain. In the defence there are two points raised: one is that, as regards the Plaintiffs, who say they let these carriages to the *Blacker Main Company*, they were not the Plaintiffs' carriages to let; they had no title, they had no possession. Of course the lessees had the possession. But the title of the Plaintiffs to sustain this action is called in question by the pleadings as they stand. Two points, and two points only, are raised in the discussion before me; they are these: first, Is the transaction in respect of which the Plaintiffs claim to have a title to these wagons valid or not? That depends upon the *Bills of Sale Act* of 1882. The next is, whether the Plaintiffs have a title or not, does the 97th section of the *Railways Clauses Consolidation Act* entitle the Defendants, the railway company, to retain the wagons, nine in number, which are in their possession, until their just demand in respect of what in the Act of Parliament are called "tolls" shall have been paid to them?

Now, the first point is one of very vital importance, extending far beyond any interests which are involved here; and the Plaintiffs in proving their case have proved these plain facts:—That the *Blacker Main Company* being in want of money begged the Plaintiff company to lend them the money, and one of the purposes for which that money was lent was to redeem some charge which another company had over 100 wagons, including the wagons in question, and to advance to the *Blacker Main Company* a further sum, making in the whole £1000. That is the true transaction between the parties. That is carried into effect by the cheques that have been referred to, and the invoice by which the *Blacker Company* purport to sell for £1000 the wagons in question to the Plaintiff company.

Now the *Bills of Sale Amendment Act* is troublesome enough, whenever one has to consider it, and it is perhaps to be regretted that the drawing of that Act did not fall into abler hands than seem to have been employed upon it. But the language of the Act itself is very plain and clear, and the policy of the Act is also very plain and clear. The policy of the Act is to prevent a man, commercial or otherwise, from getting a false credit by pretending to be the owner of goods which are not his, but which

V.-C. B.
1886
NORTH CENTRAL WAGON COMPANY v. MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY CO.

belong to somebody else. The object of the Legislature was to cure an evil which had existed for a long while, and which one is very familiar with in bankruptcy from the reign of *James* I. The law as to order and disposition has always prevailed. It has sometimes been considered to be an excessively hard law, but in spite of all cavil and objections it has prevailed, up to this present moment. The *Bills of Sale Act* (1878) *Amendment Act*, 1882, enacts in very distinct terms that for public security, in the interests of the whole community, bills of sale shall be registered, and it says the expression "bill of sale" shall have the same meaning as in the principal Act, "except as to bills of sale or other documents mentioned in sect. 4 of the principal Act, which may be given otherwise than by way of security for the payment of money, to which last-mentioned bills of sale and other documents this Act shall not apply." But to transactions of loan, lending money and taking security for money, it is quite clear that the Act applies in its entirety. It is not only the policy of the law which nobody can dispute, but the plain enactment of the statute, and the 9th section enacts that "a bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to this Act annexed." It need not be remarked that the form in the schedule has by no means been observed in this case.

Now what is the evidence which the Plaintiffs have adduced here? In the claim they have stated only an agreement for the letting of these wagons. But they say, We will shew you how it began; the *Blacker Company* asked us to lend them £1000, and we agreed to do it if they would secure to us the repayment of that £1000 with 7 per cent., and we hit upon this plan,—that in order to avoid the *Bills of Sale Act* (and it is perfectly allowable if it can be done lawfully) we proposed that the transaction should take this form; we will say nothing about purchase and sale, but by dint of purchase and sale we, the Plaintiff company, becoming the owners of this property called the 100 wagons, let them to the *Blacker Company* upon such terms as that during the period of the tenancy they should by instalments pay back the £1000 which we had lent to them. Is that anything but a security for the money? If it was the first time the matter had

been discussed, nobody, I think, upon that statement of facts could entertain any doubt about it. But it is entirely covered by the decision which has been referred to in the case of *Ex parte Odell* (1), which is as clear and plain a decision on the point as can be. It is true that that was a case of bankruptcy, and the interest of the trustee in bankruptcy came into play and had to be decided upon. But the Act of Parliament is universal—it is not confined to bankruptcy at all. It enforces a general rule of law prescribing the only way in which such transactions can be lawfully conducted. If it is a loan you must say so; you must adopt the form given in the schedule. If you do not, then the transaction is void, the bill of sale is void. Not only is the case of *Ex parte Odell* directly an authority for that proposition, but the case of *Cochrane* v. *Matthews* (2), before Lord Justice *Lindley*, which is printed in a note to the former case, is more directly pertinent to the present case perhaps than the case of *Ex parte Odell*. For there with a certain degree of ingenuity and a good deal of care the transaction was made to consist of two particular documents; but Lord Justice *Lindley*, grappling with the sense of the case and the meaning of the law, felt himself under no difficulty about that, for he said although two, they are in effect one, and this is plainly an attempt to do that which under the *Bills of Sale Act* cannot be done. I do not find it necessary to read the long, discriminating, and careful judgment which Lord Justice *Lindley* delivered in that case, but every word of it is to be taken into consideration in deciding this case. Here I find by the evidence of the Plaintiffs themselves that the transaction was in its very beginning a contract for a loan to be secured—a loan providing for the re-payment of the money in the manner then stipulated for and afterwards more distinctly expressed, and so the agreement—the lease of these wagons—was carried into effect. If there had been only that agreement, and if there had been nothing before the Court but that agreement, then it would perhaps have fallen within the principle which regulates contracts that have become very common nowadays, namely, contracts for the sale or hire of furniture in a house, where the stipulation is that you shall pay a

(1) 10 Ch. D. 76. (2) 10 Ch. D. 80, n.

V.-C. B.
1886
NORTH CENTRAL WAGON COMPANY v. MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY CO.

certain sum by instalments, and if you pay all the instalments, then the goods which are at present let to you shall be yours out and out. That is not this case at all, or anything like it. That is no bill of sale: that is assailable under none of the principles of the *Bills of Sale Act*. But here the Plaintiffs contracted to lend money upon the security of chattels, providing for the repayment of that sum of money and the interest that should accrue due upon it. That is as clearly, in my opinion, within the provisions of the *Bills of Sale Act* as any transaction that can be stated or suggested. Upon that ground, therefore, in my opinion the Plaintiffs' title to sue, being a possessory title, a right to possession and a rightful title to the goods claimed entirely fails, and upon that ground the claim must be dismissed.

But it would be wrong to part with the case without referring to that which is at greater length and with more distinctness referred to in the defence. The defence refers to the 97th section of the *Railways Clauses Act*. The meaning of that section is plain. The railway company is entitled to charge for tolls. The interpretation clause declares that the word "toll" shall comprehend a great many other things than those which we commonly call "tolls." "Tolls," without reference to the Act of Parliament, means the right the owner of a market has to exact from the persons bringing their merchandise there for sale a certain fee, or a certain sum for the convenience afforded to them for exposing their merchandise for sale in the market. The word "toll" is employed in the Act of Parliament not exactly in that sense. The only case in which it might be used in that sense is where persons use their own locomotive engines upon the railway built by the company. Then it would properly be strictly and only a toll. But the word "tolls" here has a much further signification than that, because the interpretation clause entitles the company to charge, and to charge under the name of "tolls," for a great variety of other things which it is not necessary for me to enumerate. Upon the evidence before me, it is clearly and distinctly proved that, under that claim of "tolls," the Defendants, the railway company, have charged for no more than the carriage—the locomotive power supplied by them for drawing the wagons from one place to another—and the whole claim is

in that respect and for nothing else. The evidence shews that there is no charge for terminal costs, or for anything but the mere moving by the engine of the railway company the goods which are consigned by the *Blacker Main Colliery Company* to the place of their destination. Unless I disregard the 97th section, how can I read it otherwise than as the words themselves express? "If on demand any person fail to pay the tolls due in respect of any carriage or goods, it shall be lawful for the company to detain and sell such carriage, or all or any part of such goods, or if the same shall have been removed from the premises of the company, to detain and sell any other carriages or goods within such premises belonging to the party liable to pay such tolls," and so on.

Then it is said it was intended by the Legislature to give to the railway company, who are entitled to receive the tolls, the right also to detain the goods if the tolls are not paid upon them. The evidence on the subject is clear, distinct, and simple. Monthly accounts were rendered of the coal sent by the *Blacker Main Company* on to the siding; the wagons containing the coal were there taken hold of, as it is said, by the railway company, and moved from the siding to their several places of destination. The charges for the coal are printed and put up on a large board, pursuant to the Act of Parliament, and the book which has been referred to, which railway companies are directed to keep, seems to have been properly kept, and the accounts being open to everybody's investigation, no kind of fault has been found with any of the items in the account; every part of it is most distinct; and when the Defendants, the railway company, to whom tolls were unquestionably due on accounts properly rendered by them, the amount of those tolls being ascertained and not disputed, found that the *Blacker Main Company* had failed, and that a meeting of creditors was called, they at once exercised their powers of detention. I am only surprised that the case, which seems to me to be so distinct and so clear, notwithstanding the abundance of evidence that has been gone into, should have occupied so much time, or that it should have been possible to raise any question upon such a right as is by this statute conferred upon the railway company who are

V.-C. B.
1886
NORTH CENTRAL WAGON COMPANY v. MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY CO.

entitled to the tolls, and, it is proved, have earned the tolls which are now demanded. The possession was in the *Blacker Main Company* entirely; at the time the tenancy was continuing default was made in payment of the rent, but no enforcement had been made of the stipulation in the agreement, by which the Plaintiff company were enabled to put an end to it, before the Defendant company exercised the right given to them by the 97th section and claimed a right to detain, which right they have exercised ever since, and now insist upon.

In my opinion the claim of the Plaintiffs has wholly failed. I should observe that at the interview which has been mentioned, at which Mr. *Ball* disputed the right of the Defendants to detain for anything at all, there was no severance of demand. The demand for the nine wagons amounts to about £25. As I understood from Mr. *Collins*' argument, if a proper tender of £25 had been made, that would have satisfied the Defendants. With that I have nothing to do at present. I find the Defendants are entitled to detain these wagons until they are paid what is due to them in respect of these nine wagons, and I am compelled therefore, to dismiss this claim, and I dismiss it with costs.

Solicitors: *Ridsdale & Son*, for *G. T. Barras, Rotherham; Cunliffes & Davenport*, for *R. Lingard-Monk, Manchester.*

G. I. F. C.

V.-C. B.
1886
April 8.

## *In re* MARSHFIELD.
## MARSHFIELD *v.* HUTCHINGS.

[1884 M. 934.]

*Practice — Administration Action — Bankers' Books — Solicitor's Accounts — Evidence — Application to inspect and take Copies — Discovery — Bankers' Books Evidence Act*, 1879 (42 & 43 *Vict. c.* 11), *s.* 7.

The Plaintiff in an administration action was a residuary legatee of *M.*, a solicitor, the testator in the action, and in the course of the cross-examination on the accounts, before the Chief Clerk, of the Defendant *H.*, who was the testator's son-in-law and executor, and was carrying on business as a solicitor under the firm of "*M. & H.*," applied to the Court under sect. 7 of the *Bankers' Books Evidence Act*, 1879, that she, or her solicitor, who had been appointed receiver in the action, might be at liberty to inspect at the bankers of the testator and the Defendant the books of the bank for four years containing the entries of the accounts of the testator and also of *M. & H.*, and to take copies of such entries. The Plaintiff's solicitor deposed that the inspection was necessary for the purposes of the action :—

*Held*, that the Plaintiff was entitled to the order asked for.

### Adjourned summons.

The action was for the administration of the estate of *Robert Dugdale Marshfield*, deceased, a solicitor at *Wareham*, the Plaintiff being a daughter and a residuary legatee under his will, and the Defendant, *Robert Coleman Hutchings*, being his sole executor and trustee.

The testator died on the 20th of August, 1883, at an advanced age, and the Defendant, who was his son-in-law, and had been before and since the testator's death carrying on business as a solicitor at *Wareham* under the firm of *Marshfield & Hutchings*, managed his property until his death under a power of attorney granted to him on the 26th of November, 1881.

The Plaintiff claimed, in addition to the usual accounts, an account against the Defendant of the property come to his hands as the testator's attorney.

On the 30th of January, 1885, administration judgment was pronounced as claimed, and Mr. *R. N. Howard*, the Plaintiff's solicitor, who carried on business at *Weymouth*, was appointed

V.-C. B.
1886
*In re* MARSHFIELD.
MARSHFIELD *v.* HUTCHINGS.

receiver. The Defendant having filed an affidavit in answer to the accounts and inquiries directed by the judgment, was cross-examined on his affidavit before the Chief Clerk.

Previous to the cross-examination the Plaintiff's solicitor applied to Messrs. *Williams & Co.*, the bankers to the testator and the Defendant, for leave to inspect and take copies of the testator's account, but the bankers refused to allow an inspection, on the ground that the Defendant objected to their so doing.

The further cross-examination of the Defendant was then adjourned pending the present application, which was a summons by the Plaintiff that, pursuant to sect. 7 of the *Bankers' Books Evidence Act*, 1879, she, or her solicitor, Mr. *R. N. Howard*, might be at liberty to inspect at the office of Messrs. *Williams & Co.*, bankers, *Wareham*, and elsewhere in the county of *Dorset*, the books of the bank for the years 1882 to 1886, both inclusive, containing entries of the accounts, both deposit and otherwise, of *Robert Dugdale Marshfield*, the testator in the action, and of the firm of *Marshfield & Hutchings*; and that the Applicant, or her solicitor, might be at liberty to take copies of such entries.

The summons was supported by an affidavit by the Plaintiff's solicitor, stating that it was essential for the working out of the evidence in the case, and for ascertaining how the testator's estate had been dealt with, that the bankers' books should be inspected and copies taken.

It appeared that prior to the cross-examination the Defendant had offered the Plaintiff's solicitor an inspection of his pass-books and also those of the testator, and that he had produced them at the cross-examination together with a further statement of account.

*Marten*, Q.C., and *Maidlow*, for the summons:—

The application is made under sect. 7 of the *Bankers' Books Evidence Act*, 1879, which enacts that, "On the application of any party to a legal proceeding a Court or Judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings." It is absolutely necessary that we should see the books in question.

*Millar*, Q.C., and *Northmore Lawrence*, for the Defendant:—

The Court will not make use of the Act to enlarge the right of discovery. The object of the Act is the same as that indicated by the preamble of the previous Act, the *Bankers' Books Evidence Act*, 1876, namely, to render the entries in bankers' books admissible in evidence, and to enable copies of the entries to be used instead of producing the originals: *Harding* v. *Williams* (1). The intention of the Act is to facilitate proof not to give an increased right of discovery. If this application is allowed it will be a great hardship on the Defendant, who is a solicitor, for it will enable a rival solicitor to ransack his accounts and inquire into his business transactions for the last four years. The Plaintiff should be left to his ordinary right of discovery, that is, to his right of calling upon the Defendant to make an affidavit of all documents in his possession: then the Defendant, in making such an affidavit, will be entitled to seal up all documents or parts of documents relating to matters outside the action. We have already produced our pass-books and a further account, so that the application is both vexatious and unnecessary.

BACON, V.-C.:—

In my opinion the Act of Parliament is conclusive on the point. It is true that there was a former Act on the same subject, but it has been repealed, and I need not refer to it. Before these Acts were passed a person in the position of the present applicant had a right to issue a *subpœna duces tecum* to compel the bankers to produce all their books and to attend to be examined on the contents of those books. Any party who formerly had that right can now obtain an order for leave to inspect and take copies of the books. All the Act has done is to relieve bankers from the burden of having to attend on their subpœna, which would be very troublesome to them, and would interrupt their business; and it gives the party who has a right to issue such a subpœna as I have described a readier and more convenient mode of producing in evidence the entries contained

(1) 14 Ch. D. 197.

V.-C. B.
1886
*In re* MARSHFIELD. MARSHFIELD *v.* HUTCHINGS.

in the bankers' books in support of his claim. I think that the present applicant is entitled to that. I have nothing to do with the danger or the imaginary danger which has been suggested, that some hostile solicitor, having the opportunity of examining these books, might make a most unjust use of them by diffusing information in and about the neighbourhood relating to the Defendant's transactions other than those which are the subject of this action. I cannot take the view that the solicitor would be guilty of that kind of misconduct which is suggested.

I find that the language of the Act is plain and that the object of it is plain. I find that the Plaintiff, who is now conducting the cross-examination of the Defendant, desires, in order to enable her to complete that cross-examination, to inspect the books of the bankers. The pass-books are nothing to the purpose. It is not competent to the Defendant to say to the Plaintiff "I will limit your inspection," when the Plaintiff is entitled to a full inspection.

I think the order asked for by the summons is quite right, and I make it accordingly.

Solicitors: *Wainwright & Baillie; A. E. Munns.*

G. I. F. C.

## *In re* BRITON MEDICAL AND GENERAL LIFE ASSURANCE ASSOCIATION.

KAY, J.
1886
*Feb.* 18.

*Petition for winding up Company—Subsequent Summonses before a Magistrate to recover Penalties—Quasi-Criminal Proceedings against the Company—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 85 [*Revised Ed. Statutes, vol. xiv., p.* 222]—*Jurisdiction—Injunction.*

A petition had been presented for the winding-up of a company, but before any order was made for that purpose summonses were taken out at a police-court against the company, by a person not interested in the affairs of the company, to recover penalties for alleged offences under the *Companies Act*, 1862, and the *Life Assurance Companies Act*, 1870. On motion for an injunction to restrain the proceedings against the company before the magistrate, the Court *held*, that it had jurisdiction under the 85th section of the Act of 1862, and made the order.

## MOTION.

On the 23rd of January, 1886, a petition having been presented praying for an order to wind up the *Briton Medical and General Life Assurance Association, Limited*, No. 2, an order was made for the appointment of a provisional liquidator, and the petition was referred to Chambers for the Chief Clerk to ascertain whether a scheme could be adopted for the reduction of the contracts of the company, instead of a winding-up order being made. After the presentation of the petition *Bernard Boaler*, who it was admitted had no interest in the company himself, but who, it was stated, represented certain policy-holders, took out four summonses at the police-court, *Bow Street*, against the company for the recovery of penalties under the *Companies Act*, 1862 (25 & 26 Vict. c. 89), ss. 26, 27, 44, 65, and 66, and under the *Life Assurance Companies Act*, 1870 (33 & 34 Vict. c. 61).

The summons under sect. 44 was for the recovery of penalties in respect of an alleged default by the association in neglecting to publish a statement as to its capital, liabilities, and assets according to the form D. in Schedule I. to the Act; two other of the summonses were under ss. 26 and 27, also for the recovery of penalties in respect of an alleged default by the association in neglecting in the years 1884 and 1885 to publish the annual list

KAY, J.
1886
*In re* BRITON MEDICAL AND GENERAL LIFE ASSURANCE ASSOCIATION.

of members which was required to be published, and the remaining summons was under sect. 10 of the *Life Assurance Companies Act*, 1870, in respect of an alleged default by the association in neglecting to make the annual statement of revenue as required. Three of the summonses were taken out against the directors of the association as well as against the association itself.

This was a motion on behalf of the association for an injunction to restrain *Bernard Boaler* until the hearing of the petition, or until further order, from taking any further proceedings upon the summonses taken out by him against the association.

*Hastings*, Q.C., and *H. Burton Buckley*, for the association, said that the motion was made under sect. 85 of the *Companies Act*, 1862, which enacted that "the Court may, at any time after the presentation of a petition for winding up a company under this Act, and before making an order for winding up the company, upon the application of the company, or of any creditor or contributory of the company, restrain further proceedings in any action, suit, or proceeding against the company upon such terms as the Court thinks fit." . . . and submitted that the word "proceedings" was large enough to include any proceedings upon the summonses before the magistrate at *Bow Street* for the recovery of penalties under the *Companies Act*, 1862, and the *Life Assurance Companies Act*, 1870.

*J. Watson Moyses*, for *Bernard Boaler*, objected that the Court had no jurisdiction to restrain the proceedings upon the summonses for the recovery of penalties under the Act of 1862, as they were criminal or *quasi*-criminal: *Saull* v. *Browne* (1); *Kerr* v. *Corporation of Preston* (2). In those cases it was held that a Court of Equity had no jurisdiction to restrain criminal proceedings for the recovery of a penalty imposed by an Act of Parliament for a breach of its enactments. The 85th section of the *Companies Act*, 1862, referred to civil proceedings in relation to the business transactions of the company only, and the language of the section was satisfied by that construction of it, and it ought not to be strained so as to make it confer a new jurisdiction upon

(1) Law Rep. 10 Ch. 64. (2) 6 Ch. D. 463.

the Court, and bring in criminal or *quasi*-criminal proceedings. The summonses were against the directors as well as against the association, and the Court certainly had no jurisdiction to grant an injunction to restrain the proceedings against them.

[*Turner* v. *Turner* (1), *Mayor of York* v. *Pilkington* (2), and *Kerr* on Injunctions (3) were also referred to.]

*Hastings*, in reply:—

Sect. 85 conferred an express statutory authority, and the word "proceedings" in the section should be construed by reference to other sections in the statute. Sects. 65 and 66, for instance, which were headed "Legal proceedings," pointed out the mode of procedure for the recovery of penalties, and gave authority to direct the whole or part of the penalty for the "payment of the costs of the proceedings." The motion was not for an injunction to restrain the proceedings on the summonses against the directors.

[KAY, J.:—Sect. 66 enacted that all penalties should be paid into the receipt of Her Majesty's Exchequer in such manner as the Treasury might direct. Should not the Crown be represented by the Attorney-General?]

The order now made on the motion would not bind the Crown.

KAY, J.:—

In this case a petition has been presented asking for the winding-up of this association, and proceedings have been instituted at *Bow Street* Police Court under the *Companies Act*, 1862, by one *Bernard Boaler*, who is not personally interested in the association, to recover penalties imposed by the *Companies Act* of 1862, and by the *Life Assurance Companies Act*, 1870. No order has been made upon the petition for winding up the association except for the appointment of a provisional liquidator. A motion has now been made under sect. 85 of the *Companies Act* of 1862, for an injunction to restrain the proceedings of Mr. *Boaler* until the hearing of the petition, or until further order. The 85th section

(1) 15 Jur. 218. (2) 2 Atk. 302.
(3) 2nd Ed. p. 3.

KAY, J.
1886
*In re* BRITON MEDICAL AND GENERAL LIFE ASSURANCE ASSOCIATION.

gives power to the Court, in circumstances such as the present, to restrain "further proceedings in any action, suit, or proceeding against the company." It has been objected that this is a criminal proceeding, and that it has been decided in more than one case, notwithstanding what Lord *Hardwicke* did in the *Mayor of York* v. *Pilkington* (1), that a Court of Equity does not ordinarily assume jurisdiction to restrain *quasi*-criminal proceedings to recover penalties. The first case cited was *Saull* v. *Browne* (2), where it was held that the Court will not prevent a plaintiff in this Court from proceeding in a Criminal Court against a defendant to the suit in this Court, unless the case raised and the objects sought are identical. The question came before the late Master of the Rolls, Sir *George Jessel*, in the case of *Kerr* v. *Corporation of Preston* (3), in which he also held that a Court of Equity had no original jurisdiction to restrain *quasi*-criminal proceedings for the recovery of penalties under the *Public Health Act*, 1875. But those were not cases under the *Companies Act*, 1862, and the question now is whether power has been conferred on the Court by sect. 85 of that Act to restrain these proceedings before the magistrate. Such a proceeding is not an "action" or "suit," but is it or not a "proceeding" within the meaning of that section? In order to determine that, it is right to look at what the Act says in reference to proceedings against a company. Now sect. 65, which is the first of a group of sections headed "Legal proceedings," prescribes the mode in which offences under the Act made punishable by any penalty are to be prosecuted, and sect. 66 enacts that "the justices or sheriff imposing any penalty under this Act may direct the whole or any part thereof to be applied in or towards payment of the costs of the proceedings, or in or towards the rewarding the person upon whose information or at whose suit such penalty has been recovered; and subject to such direction, all penalties shall be paid into the receipt of her Majesty's Exchequer in such manner as the Treasury may direct, and shall be carried to and form part of the Consolidated Fund of the *United Kingdom*." There the word "proceedings" is used, and I cannot doubt that in the sub-

(1) 2 Atk. 302.
(2) Law Rep. 10 Ch. 64.
(3) 6 Ch. D. 463.

sequent sect. 85, which enables the Court to restrain further proceedings in any action, suit, or proceeding, that which the Act itself has called "proceeding" is intended to be comprised. It seems to me, upon the construction of the Act, that is the meaning. Then if I look to the consequences of a contrary decision I see that any company might be greatly embarrassed, pending a petition for a winding-up order, by numerous proceedings of this kind taken by a common informer before a magistrate to recover penalties, if the Court should be powerless to interfere. It seems to me that whatever the general rule may be, sect. 85 of the *Companies Act* of 1862 gives power to the Court to restrain *quasi*-criminal proceedings for the recovery of penalties under the provisions of the Act. The same reasoning applies to the proceedings under the *Life Assurance Companies Act*, 1870 (33 & 34 Vict. c. 61), which Act by sect. 20 refers to the Act of 1862 as to the mode in which penalties are to be recovered and applied. It occurred to me in the course of the argument that as the penalties under sect. 66 may become payable to the Crown it might not be right to make an order such as is now asked in the absence of the Attorney-General. But I think the answer to that objection is obvious. Any order made against Mr. *Boaler* to prevent his recovering the penalties would not in the least bind the Crown, which might institute any proceedings it thought fit. Therefore I see no reason why I should not make the order now asked for to restrain Mr. *Boaler* from taking any proceedings against the association on the summons until the hearing of the petition for winding-up or until further order. There will be no order as to costs. Of course there is no jurisdiction to restrain proceedings against the directors personally, but no such order is now asked.

Solicitors: *Lewin, Gregory, & Anderson; W. W. Brown.*

T. F. M.

CHITTY, J.
1886
April 12.

## *In re* THURSTON.
## THURSTON *v.* EVANS.

[1886 T. 327.]

*Power of Appointment—Will executing Power—Death of Appointee before Testatrix—Appointment of Executor—Intention.*

A testatrix exercised a general power of appointment, and appointed an executor who was the sole trustee of the property:—

*Held*, upon the construction of the will, that she had not made the property the subject of the power her own for all purposes, and that the gift over in default of appointment took effect.

The appointment of an executor is not sufficient evidence of intention to make the property the subject of the power assets for all purposes.

### Adjourned Summons.

This was an application in the administration of the estate of one *Robert Thurston* to determine the question whether one of his children, *Emerita Mathews*, had by her will so dealt with certain leasehold property over which she had a general power of appointment as to make it her own for all purposes.

The said *Robert Thurston*, by his will dated the 22nd of August, 1862, after appointing his son, the Plaintiff, *Robert George Thurston*, and his daughter, the said *Emerita Mathews*, the wife of *Richard Mathews*, his executors and trustees, bequeathed a certain leasehold house to them upon trust for *Emerita Mathews* during her life for her separate use without power of anticipation, and after her death for her children, as therein mentioned; but in case there should be no child of the said *Emerita Mathews* living at her decease who should live to attain a vested interest in the said leasehold house (which event happened), then in trust for such person or persons as the said *Emerita Mathews* should by her will direct or appoint, and in default of appointment the testator directed that such leasehold house should fall into and form part of his residuary personal estate. The testator bequeathed his residuary personal estate unto and equally between the Plaintiff and the said *Emerita Mathews*, their executors, administrators, and assigns, for their own use absolutely.

*Robert Thurston* died on the 10th of May, 1868.

*Emerita Mathews*, by her will dated the 22nd October, 1872, after stating that it was to take effect in the event only of her not leaving any issue living at her death, and reciting her father's will, in exercise of the aforesaid power of appointment and of every other power then or at the time of her death thereunto enabling her, directed and appointed that from and after her decease the said leasehold house should be held by the Plaintiff upon trust to pay to her husband, the said *Richard Mathews*, the rents and the profits thereof during his life, and after his death that the said leasehold house should be held by the Plaintiff in trust for her niece, *Eliza Emerita Wilson*, absolutely, and she appointed the Plaintiff executor and trustee of her will.

*Eliza Emerita Wilson* died on the 13th of July, 1877.

*Emerita Mathews* died on the 17th of July, 1879, without ever having had any issue.

*Richard Mathews* received the rents and profits of the leasehold house from the date of his wife's death to the 13th of November, 1885, when he died, having by his will dated the 1st of August, 1885, appointed his niece, *Mary Ann Evans* (the Defendant), his sole executrix and residuary legatee.

The Plaintiff commenced this action against the said *Mary Ann Evans*, claiming a moiety of the said leasehold house under the residuary bequest in *Robert Thurston's* will. The Defendant, as representing the husband, claimed the whole, on the ground that the testatrix had so exercised the aforesaid general power of appointment as to make the property, the subject of the power, her own for all purposes.

*W. Freeman*, for the Plaintiff:—

There is no indication of any intention on the part of the testatrix to make this leasehold property her own for all purposes. The appointment was for a limited purpose only, and as the purpose fails by the death of the niece in the lifetime of the testatrix, the appointment fails too: *In re Davies' Trusts* (1). It is always a question of intention in these cases: *In re Pinède's Settlement* (2);

(1) Law Rep. 13 Eq. 163. (2) 12 Ch. D. 667.

CHITTY, J. 1886 *In re* THURSTON. THURSTON v. EVANS.

*In re Van Hagan* (1); *In re Ickeringill's Estate* (2); *Willoughby Osborne* v. *Holyoake* (3). There is no charge of debts; the property is not even taken from the original trustee. None of the reported cases are exactly similar, but the principles apply.

*A. àB. Terrell*, for the Defendant:—

The mere accident that the executor happens to be also the surviving trustee of the will creating the power can make no difference. The appointment of an executor is an indication of an intention to make the property, the subject of the power, assets for all purposes: *Brickenden* v. *Williams* (4). There is no doubt the testatrix intended to exercise this power: she expressly refers to it, and there is sufficient indication that she intended to exercise it for all purposes, and not for the limited purposes only contended for by the Plaintiff.

CHITTY, J.:—

The question I have to decide is whether this testatrix has shewn an intention to make this property her own for all purposes, as she might well have done. The case is a somewhat singular one, for the testatrix, who was a married woman, deals with one property only, viz. the property the subject of this power, and has made no attempt to deal with the savings of her separate estate, or with any other property she might have had. She begins by stating that her will is to take effect only in the event of her not leaving any issue living at her death; and after reciting her father's will she exercises the power as follows:—[His Lordship read the will, and continued:—] Now *R. G. Thurston*, whom she appoints her executor, was also a trustee with her of her father's will, and as her will necessarily presupposes her own death, this bequest amounts to a direction to the surviving trustee of her father's will to hold the property, the subject of this power, upon trust for her husband for life, and after his death for her niece. She seems to have manifested an intention to exercise this power only for the benefit of the two persons mentioned in her will, and to have so worded her will as to amount to a mere

(1) 16 Ch. D. 18.
(2) 17 Ch. D. 151.
(3) 22 Ch. D. 238.
(4) Law Rep. 7 Eq. 310.

exercise of the power for the benefit of those two persons, leaving the property the subject of the power vested in one of the original trustees. This appears to me to be a very material fact in determining the question whether she intended to take this property out of her father's will and make it her own. The only ground for arguing that an intention has been shewn by this testatrix to make the property assets for the purpose of her own will is the appointment of an executor; but it may very well be answered that the executor was appointed for the purpose of proving the will: it is more convenient for an executor than for beneficiaries to do this, though his appointment was not necessary for the purpose of making this will a good execution of the power. The mere appointment of an executor is not, however, sufficient evidence of an intention on the part of this testatrix to make this property her own. There is no attempt in this will to dispose of any other part of her estate, the will contains no direction for payment of debts or funeral expenses: there is nothing but a bare exercise of the power, and therefore on the true construction of this will I can find no indication of intention on the part of this testatrix to make this property her own for all purposes. I cannot say that it was a hopeless or idle contention on the part of the Defendant, so I will allow her her costs out of the estate.

Solicitor for Plaintiff: *G. A. Hall.*
Solicitor for Defendant: *W. T. Reeve.*

F. G. A. W.

CHITTY, J.
1886
April 14.

## *In re* GENERAL HORTICULTURAL COMPANY. *Ex parte* WHITEHOUSE.

*Garnishee Order—Equitable Charge—Priority Notice—Rules of Supreme Court, 1883, Order* XLV., *r.* 1.

A garnishee order under Rules of Supreme Court, 1883, Order XLV., binds only so much of the debt owing to the debtor from a third party as the debtor can honestly deal with at the time the garnishee order *nisi* was obtained and served; consequently it is postponed to a prior equitable assignment of the debt, even in the absence of notice.

### ADJOURNED SUMMONS.

This was an application to settle the priorities of certain incumbrancers on a sum of £245 1*s.* 3*d.* in the hands of the liquidator of the above-named company which had been duly allowed to one *John Wills* in the winding-up for work done by him for the liquidator, and which he had charged as follows:

By a memorandum in writing of the 26th of June, 1884, *John Wills* charged the said debt of £245 1*s.* 3*d.* in favour of Messrs. *Withall & Co.* with the repayment of £81 9*s.* 8*d.* On the 8th of August, 1884, notice of this charge was given in writing by the said Messrs. *Withall & Co.* to the official liquidator. By two memoranda in writing, both dated the 7th of July, 1884, *John Wills* also charged the said sum of £245 1*s.* 3*d.* in favour of *Charles Hillier* and *S. W. Segar* respectively with the repayment of £100 and £70.

On the 24th of July, 1884, one *Whitehouse* recovered judgment against the said *John Wills* in the Queen's Bench Division for £158 17*s.* 2*d.* Notice of this judgment was served on the official liquidator on the 8th of August, 1884.

On the 25th of November, 1885, *Whitehouse* obtained a garnishee order *nisi* under the Rules of the Supreme Court, 1883, Order XLV. rule 1, attaching the said debt of £245 1*s.* 3*d.* due to *John Wills* from the company, and served the order on the following day. The order *nisi* was made returnable for the 4th of December, when the Master, having first made the order absolute on the production of an affidavit of consent by *John Wills*,

subsequently struck out his enforcement on the order and wrote: "Discharged—Company winding-up. Apply to Chief Clerk." *Whitehouse* did not appeal from this order or take any further steps to enforce his garnishee order till the 22nd of January, 1886, when the present summons was issued in the winding-up claiming payment of his debt and to enforce his attachment. On the 26th of January, 1886, notice in writing of *Hillier* and *Segar's* charges was given to the official liquidator. Two other summonses, one by Messrs. *Withall & Co.* and one by *Hillier* and *Segar*, had also been issued to enforce their respective charges, but by arrangement they had been amalgamated and all came on for argument together. It was admitted that Messrs. *Withall & Co.'s* claim for £81 9*s.* 8*d.* had priority over all the other charges, and the only point argued was whether *Whitehouse's* judgment and garnishee order *nisi* had priority over the respective charges of *Hillier* and *Segar*. *Whitehouse* made an affidavit to the effect that he had had no notice of the previous charges.

*D. L. Alexander*, for Messrs. *Withall & Co.*, was not called upon to support his claim.

*Charles Browne*, for Mr. *Whitehouse*:—

*Whitehouse* had no notice of any prior charges at the time he recovered judgment in the Queen's Bench Division or when the garnishee order *nisi* was obtained. The liquidator had notice of my judgment in August, 1884, five months before he received notice of *Hillier* and *Segar's* debts, and for that reason *Whitehouse* ought to have priority. The garnishee order *nisi* under Order XLV., rule 1, is binding from the date of service; the property in the debt was transferred and there was a complete and perfect security the moment the order was served: *Ex parte Joselyne* (1). The fact that the order *nisi* has not been made absolute makes no difference: *Ex parte Joselyne;* it is absolute against the debtor. The Master only refused to make it absolute because the company was in liquidation and he therefore considered application should be made in the winding-up. Under

(1) 8 Ch. D. 327.

CHITTY, J. 1886 *In re* GENERAL HORTICULTURAL COMPANY. *Ex parte* WHITEHOUSE.

these circumstances *Whitehouse's* claim must prevail over all the other incumbrancers except Messrs. *Withall & Co.*

*Haldane,* for *Hillier* and *Segar*:—

We do not admit that *Whitehouse* never received notice of these charges; further, I say the garnishee order was discharged; still, even if the garnishee order were absolute, it can only affect what the debtor could honestly deal with: *Gill* v. *Continental Union Gas Company* (1): *Hirsch* v. *Coates* (2). The doctrine of notice or no notice or priority of notice does not affect the question: *Pickering* v. *Ilfracombe Railway Company* (3); *Scott* v. *Lord Hastings* (4); *Robinson* v. *Nesbitt* (5). The garnishee order therefore does not affect us as prior incumbrancers. True the authorities for the proposition are under 1 & 2 Vict. c. 110, and the *Common Law Procedure Act,* 1854, but Order XLV. regulating the present practice as to garnishee orders and attachment of debts is founded on and is the same as the old practice, and the principles of those cases apply.

*Charles Browne* in reply.

*Bramwell Davis,* for the official liquidator.

CHITTY, J.:—

I prefer to decide this case on broad principles: putting aside all question whether *Whitehouse* did or did not have notice of the prior charges and leaving out of consideration the actual effect of a garnishee order *nisi* which has been served but not made absolute, I give my judgment on the substance of the case, which is this: the liquidator of this company had in his hands a sum of money which had been allowed to *Wills* in the winding-up of the company. [His Lordship shortly stated the facts down to the obtaining and service of the garnishee order *nisi,* and continued:—] This order *nisi* was obtained under Rules of Supreme Court, Order XLV., r. 1, which re-embodies the practice

(1) Law Rep. 7 Ex. 332.
(2) 18 C. B. 757.
(3) Law Rep. 3 C. P. 235.
(4) 4 K. & J. 633.
(5) Law Rep. 3 C. P. 264.

established by the *Common Law Procedure Act*, 1854, as to garnishee orders and the attachment of debts; the effect of this order *nisi* was to give the judgment creditor execution against the debts owing to his debtor. The *Common Law Procedure Act*, 1854, is, so far as attachment of debts is concerned, in *pari materiâ* with 1 & 2 Vict. c. 110, and as to a charging order under these latter Acts it has now been settled that it charges only what the judgment debtor can himself honestly deal with; that rule is now settled. Order XLV. is in *pari materiâ* with both the Acts I have mentioned. It is argued by Mr. *Browne* that I ought not to apply the well-settled rule to this case. But I see no reason why any Act of Parliament or Rules of Court should be so interpreted as to make a man do a dishonest act, and yet if I were to allow Mr. *Browne's* argument the judgment creditor would obtain, not the property of the judgment debtor, but that of some one else. The Court cannot arrive at such a conclusion unless the Act of Parliament compels it to do so. It was considered at one time that the Court could, under the wording of 1 & 2 Vict. c. 110, arrive at the conclusion contended for by Mr. *Browne*, and in *Watts* v. *Porter* (1) one of the Common Law Courts actually did arrive at that curious conclusion, but on the question being reconsidered in subsequent cases the law was set right. The principle, which is well stated in *Hirsch* v. *Coates* (2) as long ago as 1856, applies in full force to Order XLV., and it is upon this principle I propose now to act. The assignment and charge from *Wills* to *Hillier* and *Segar* is binding and good as between assignor and assignee, and the equitable doctrine of notice only comes in as between incumbrancers. As between two incumbrancers the Court looks at the equitable position of the two claimants, and holds that as between them the first assignee, by omitting to give notice of his charge has enabled the assignor to deal with the fund as if he were still the owner, and thus to commit a fraud upon the subsequent assignee, and consequently must be postponed: the first assignee had been negligent, the second diligent, and therefore the second assignee was allowed for his diligence by being first to give notice, to rank first.

(1) 3 E. & B. 743. (2) 18 C. B. 757.

CHITTY, J.
1886
*In re* GENERAL HORTICULTURAL COMPANY. *Ex parte* WHITEHOUSE.

I apply these principles broadly as against the judgment creditor who has obtained the garnishee order here, and say that he can only obtain what the judgment debtor could honestly give him.

The result, therefore, is that Mr. *Whitehouse* must be postponed.

Solicitors for *Withall & Co.: Withall & Co.*
Solicitors for *Whitehouse: Batty & Whitehouse.*
Solicitors for *Hillier* and *Segar : Underwood & Co.*
Solicitor for the official liquidator: *Arthur Toovey.*

F. G. A. W.

## *In re* WOOD.
## WARD *v.* WOOD.

[1885 W. 2339.]

NORTH, J.
1886
*May* 11.

*Will—Erroneous Statement of Fact—Advance to Legatee to be brought into Hotchpot—Right of Legatee to adduce Evidence to contradict Will as to amount of Advance.*

A testator gave the proceeds of sale of his real and personal estate to trustees, on trust to divide the same among his children living at his death, and the issue of deceased children, in equal shares *per stirpes*. The will stated that the testator had advanced to four of his sons respectively certain specified amounts, on account of their respective shares, and the testator directed that the "respective sums hereinbefore recited to have been advanced" should be brought into hotchpot by the four sons respectively for the purposes of the division of his estate:—

*Held*, that the sons were bound by the statement in the will of the amounts of the advances made to them, and were not entitled to adduce evidence to shew that the advances which had been made to them were in fact of less amount.

*In re Aird's Estate* (1) followed.

The decision in that case is not overruled by *In re Taylor's Estate* (2).

ORIGINATING SUMMONS for the determination of some questions arising in the administration of the estate of *Joseph Wood*, who died on the 13th of June, 1884.

The testator, by his will dated the 31st of August, 1876, after directing the payment of his debts and funeral and testamentary expenses, gave, devised, and bequeathed unto *Samuel Ward* and his son *Joseph Wood*, all his real and personal estate, upon trust for sale as therein mentioned, and to stand possessed of the proceeds of sale upon trust (subject to the provisoes thereinafter contained) to pay and divide the same unto and amongst his children living at his decease, and the issue of such of his children as were already dead or should thereafter die, as tenants in common, in such manner that each of his children living at his decease should take one equal share, and the children or child of each deceased child should take equally amongst them (if more than one) the share which their, his or her parent would have

(1) 12 Ch. D. 291. (2) 22 Ch. D. 495.

NORTH, J. 1886 *In re* WOOD. WARD *v.* WOOD.

taken, if living. The will contained the following clause: "And whereas prior to the day of the execution of this my will I have already paid to or permitted to be received by my son *James* on account of his share prior to my death the sum of £400, and to my son *Mark* the like sum of £400 on account of his share, and to my son *Jesse* the sum of £200 on account of his share, and to my son *William* the sum of £100 on account of his share, now I declare that the persons or person interested in the share or shares of any of my said children, *James*, *Mark*, *Jesse*, and *William*, shall not be entitled to such share or interest in the said trust premises without bringing into hotchpot the respective sums hereinbefore recited to have been advanced, together with interest thereon at the rate of 5 per cent. annum (such interest in the cases of my sons *James*, and *Mark* and *Jesse*, to be reckoned from the 1st of January, 1864, and in the case of my son *William* from the 6th of November, 1871), together also with any other sum or sums which may hereafter be advanced on account of their or any of their respective share or shares, together with interest at the rate of 5 per cent. per annum from the date of such advances."

The question was whether the sons *James*, *Jesse*, and *William* respectively, and the children of the son *Mark* (who was dead) were bound by the statement in the will as to the amount of the advances which had been made by the testator to the four sons named respectively, or whether they were at liberty to shew that no such advances had been made by the testator, or that advances of less amounts respectively had been made by him.

The Plaintiffs were the trustees and executors of the will; the Defendants were the testator's sons *James*, *Jesse*, and *William*, the children of the deceased son *Mark*, and *Ann Elizabeth Wood*, a daughter of the testator.

*Northmore Lawrence*, for the Plaintiffs:—

The question is, whether the sons, who are mentioned in the will as having received certain amounts from the testator on account of their shares, are bound by those statements, or whether they may adduce evidence to shew that advances of smaller amounts only, or no advances at all, were made to them by the testator.

*G. E. S. Fryer*, for all the Defendants but *Ann Elizabeth Wood*:—

The sons are not bound by the recitals in the will, and an account should be taken of the advances made to them: *In re Taylor's Estate* (1). In that case the Court of Appeal in effect overruled the decision of Mr. Justice *Fry* in *In re Aird's Estate* (2).

*Stirling*, for *Ann Elizabeth Wood*.

NORTH, J.:—

These are voluntary gifts by the testator to his sons, and I think they must take them as they find them. They are to take them subject to a charge upon them of the sums which the testator has recited that he has paid to them or permitted them to receive. If he had meant to charge the sums actually advanced to them I think he would have referred to them as such. If there is a mistake in the will as to the amounts of the advances, so much the worse for the persons to whom the gifts are made. This seems to me clear upon the words of the will as they stand.

In *In re Aird's Estate* Mr. Justice *Fry* took the same view of very similar words, and I do not find that in *In re Taylor's Estate* the Court of Appeal said that the decision in *In re Aird's Estate* was wrong. The decision of the Court of Appeal was based on the very special words of the will and codicil in that case. One view of their construction would have led to an absurdity, the other was very simple. That case was decided on its special circumstances, and it does not, I think, in any way interfere with *In re Aird's Estate* or affect the present case.

Solicitors: *Emmet, Son, & Stubbs*, agents for *J. Haley, Bradford*; *W. & J. Flower & Nussey*.

(1) 22 Ch. D. 495. (2) 12 Ch. D. 291.

W. L. C.

BUTT, J.
1886
*May* 10–16, 18–20.

## EDISON AND SWAN ELECTRIC LIGHT COMPANY *v.* WOODHOUSE.

[1884. E. 89.]

*Patent—Sufficiency of Specification.*

A patent, dated as to its final specification May, 1880, claimed an electric lamp with a carbon filament for its illuminating conductor. The patentee took out a subsequent patent, dated as to its provisional specification December, 1879, for a method of making carbon filaments for electric lamps:—

*Held*, that there had been no such want of disclosure as to avoid the first patent.

*THOMAS ALVA EDISON* obtained letters patent (No. 4576, 1879) for the invention of "improvements in electric lamps, and in the method of manufacturing the same." The provisional specification was left at the Patent Office on the 10th of November, 1879, and the final specification was filed on the 10th of May, 1880.

By the final specification the patentee claimed "First, an electric lamp for giving light by incandescence, consisting of a filament of carbon of high resistance, made as described, and secured to metallic wires as set forth; second, the combination of a carbon filament within a receiver made entirely of glass, through which the leading wires pass and from which receiver the air is exhausted for the purposes set forth. Third, a coiled carbon filament or strip, arranged in such a manner that only a portion of the surface of such carbon conductor shall radiate light, as set forth;" and fourth, a mode of securing the carbon filament to the leading wires.

The provisional specification of this patent No. 4576, after referring to a former patent for a lamp with a platinum burner, stated: "My present invention relates to lamps of a similar character except that carbon threads or strips are used instead of metallic wire." The other parts of the provisional specification No. 4576, relating to the nature and manufacture of the burner, are as follows: "The burner consists of a filament or thread of

carbon, preferably coiled, with the ends secured to the platinum wires, the whole being made as follows:—

"Fibrous material, such as paper, thread, wood, or any vegetable or animal matter which can be carbonised, has the ends secured to platinum wires; the fibre is wound in such a shape as to expose the least amount of surface to radiation, such as in a helix or spiral. The helix is secured to the platinum wires by plastic carbon, and the whole is placed in a closed vessel free from air and subjected to a heat sufficient to fully carbonise the fibre and leave nothing but carbon." . . . "Lampblack which has been placed in sealed crucibles and subjected to a white heat for several hours may be kneaded with tar until it reaches such a consistency as to allow its being rolled out on flat plates to very thin wires, which are sufficiently flexible to allow of coiling into helices. After they are rolled out to the proper length and size they are coated with a non-carbonisable powder of liquid and wound or coiled.

"The two ends are increased in size and secured to platinum wires; the whole is then subjected to heat in a closed tube and the volatile constituents of the tar driven off and the balance carbonised, thus making a solid and homogeneous coil, which can be then united to the leading wires of the lamp and a glass bulb blown over it and exhausted of air, and the lamp is then ready for use. The non-carbonised material prevents the spirals from touching each other until the whole has so stiffened sufficient to remain in its position.

"To assist in more rapidly manufacturing these spirals I sometimes wind the flexible carbon wires between metallic spirals, which after the carbonisation of the tar are eaten away by acids, thus leaving the carbon intact. I also sometimes roll a thread within the compound of carbon and tar, so as to allow of greater convenience in handling the same, and the flexible carbon filament is not so liable to crack by its own weight in the act of winding.

"To increase the resistance of the lampblack-tar compound I sometimes work it into a volatile powder, such as powdered camphor, oxide zinc, but to make the light insensitive to variations of the current a considerable mass of matter should be used in

BUTT, J.
1886
EDISON AND SWAN ELECTRIC LIGHT COMPANY v. WOODHOUSE.

order that the specific heat of the lamp may be increased, so that it takes a long time to reach its full brilliancy and also to die away slowly. To do this it is better to have the carbon as homogeneous as possible and obtain the requisite resistance by employing a filament several inches long and winding the same in a spiral form so that the external radiating surface shall be small."

*Thomas Alva Edison* took out another patent numbered 5127 (1879), dated as to its provisional specification, December, 1879, for "improvements in electric lamps and in the method of manufacturing the same." The specification described a mode of manufacturing "carbon filaments," not in a spiral form, but flat, in a horse-shoe shape, and broader at the ends; the filaments were to be cut with a die out of cardboard, and a number were to be carbonised in a mould at the same time. The patentee claimed: "First, an electric lamp of carbonised paper; second, the method herein specified of manufacturing carbons for electric lights, consisting in exposing the filament of paper to the action of heat in a mould to drive off the volatile portions and carbonise the paper substantially as set forth; third, a carbon for electric lights made as a filament with the ends broader for the clamping devices that connect the conductors;" and fourth, a clamp.

This was the trial of an action to restrain the infringement of patent No. 4576, 1879, and two other patents.

*Aston*, Q.C., Sir *R. E. Webster*, Q.C., *Moulton*, Q.C., and *P. Edward Dove*, for the Plaintiffs.

Sir *Horace Davey*, Q.C., S.G. (*Charles*, Q.C., *Macrory*, and *G. H. Rawson*, with him), for the Defendants:—

A patentee is bound to tell the public in his specification the best method known to himself of carrying out his invention: *Bovill* v. *Moore* (1); *Plimpton* v. *Malcolmson* (2).

*Edison*, at the date of his final specification of patent No. 4576, knew of the better mode of making carbon filament, the subject of patent No. 5127. It would be unfair that a patentee should split up his invention so that the public would have to pay more

(1) Davies, P. C. 361. (2) 3 Ch. D. 531, 576.

than one royalty in respect of the manufacture of a patented article. Therefore patent No. 4576 is void.

*Aston*, in reply:—

The second patent is not for anything covered by the first patent; it is for making an article used in the machine the subject of the first patent in a cheaper way, and in numbers. The test is whether the second invention could have been protected by the first patent. If *Edison* had claimed his mode of making carbon filaments in his first patent he would have gone beyond his provisional specification, and his patent would have been void.

BUTT, J.:—

It was said by the Solicitor-General, and at one time I was strongly inclined to go with the suggestion, that the patent was invalid because at the time of the final specification Mr. *Edison* himself knew a better method of making a filament, and in support of that proposition his provisional specification of the 15th of December, 1879, No. 5127, was referred to. Now the date of that provisional specification was subsequent to the provisional specification we are now considering, but it was many months prior to the final specification which we are considering, and, therefore, it is perfectly true to say that at the time of the final specification Mr. *Edison* knew—I do not know whether I ought to say of a better mode—but knew, at all events, of another mode of manufacturing his carbon filament. The Solicitor-General said a better mode, and perhaps he is warranted in that; I am not prepared to deny it. Therefore, the argument is, he ought to have disclosed it in his final specification, because on the authorities, and as a matter of good sense, a patentee is not entitled to withhold from the public a discovery of which he is aware, forming an important integral part of his patent, and then take out another patent afterwards for that. It was said that so to do would be to put the public, or those, at all events, who dealt in such matters, to the inconvenience and expense of taking out a license to use two patents, whereas they ought to have had the whole benefit of the user by taking out the license for the one.

BUTT, J.

1886

EDISON AND SWAN ELECTRIC LIGHT COMPANY *v.* WOODHOUSE.

It must, however, be borne in mind that Mr. *Edison* does not claim in his patent No. 4576 for the manufacture of the carbon filament. His claim is for the union of a carbon filament possessing certain properties with the other parts of his combination. There is no evidence that at the time of filing his provisional specification No. 4576 he had discovered or knew of the process in No. 5127. I agree with Mr. *Aston* that an inventor has no right to put into his final specification as part of his invention a discovery which he had not made at the time, of which he was ignorant when he filed his provisional specification. I think, therefore, the contention on this head cannot avail against the Plaintiffs.

Solicitors for Plaintiffs: *Ashurst, Morris, Crisp & Co.*
Solicitor for Defendants: *Sydney Morse.*

D. P.

## MONTAGU *v.* EARL OF SANDWICH.

C. A.
1885
PEARSON, J.
*April* 15, 16.
C. A.
1886
*Jan.* 19, 20;
*March* 9.

[1885 M. 183.]

*Double Portions—Satisfaction—Covenant to pay Annuity—Charge on Real Estate—Devise subject to Incumbrances.*

A father on the marriage of his second son, by deed of settlement covenanted to pay him an annuity of £1000 a year for life, and to charge the annuity on a sufficient part of the real estate he might die seised of; provided that nothing in the settlement should prevent his dealing with his real estate during his life, or, so only that sufficient real estate were left charged with the annuity, by will. The father subsequently made his will by which he devised his real estate (subject to the charges and incumbrances thereon) in strict settlement on his first and other sons in tail male; he bequeathed the greater part of his personal estate among his children, giving his second son legacies the income of which when invested would be considerably more than £1000 a year. He died leaving three sons:—

*Held*, by *Pearson*, J., first, that the annuity was charged on the testator's real estate; and, secondly, that the presumption against double portions was rebutted, and the covenant to pay the annuity was not satisfied by the bequests to the second son.

On appeal,

*Held*, upon the first point, by *Bowen* and *Fry*, L.JJ. (*Cotton*, L.J., *dissentiente*), that the settlement operated not only as a covenant by the father, but also as a charge upon all the real estate of which he should die seised:

*Held*, upon the second point, by *Cotton* and *Bowen*, L.JJ. (*Fry*, L.J., *dissentiente*), that the words "subject to the charges and incumbrances thereon," were too general to rebut the presumption against double portions, and that the second son was not entitled both to the annuity and to the bequests under the will.

The doctrine of double portions discussed.

*JOHN WILLIAM*, 7th Earl of *Sandwich*, died in March, 1884, leaving three sons, namely the Defendant *Edward George Henry Montagu*, Viscount *Hichenbrook*, the present Earl, the Defendant to this action, *Victor Alexander Montagu*, the Plaintiff in this action, and *Oliver George Poulet Montagu*.

The Plaintiff was married in November, 1867; in contemplation of that marriage a deed of covenant was executed between the late Earl and the Plaintiff, dated the 26th of November, 1867, by which the Earl covenanted to pay the Plaintiff during

C. A. 1886 MONTAGU v. EARL OF SANDWICH.

the life of the Plaintiff an annuity of £1000 a year by equal quarterly payments, and further covenanted in the following terms: "And the said *John William* Earl of *Sandwich* doth hereby, so as to render the real estate (if any) of which he, the said *John William* Earl of *Sandwich* shall die seised in fee the fund primarily liable (whether as between heir-at-law and next of kin, or as between devisees and legatees) for the satisfaction or discharge of this covenant, covenant with the said *Victor Alexander Montagu*, his executors, administrators and assigns, that he, the said *John William* Earl of *Sandwich*, or his heirs or devisees, shall and will charge the said annuity or yearly sum of £1000 upon a sufficient part of the real estate of which the said *John William* Earl of *Sandwich* shall die seised in fee, and as an additional security for the payment of the same annuity shall and will give to and vest in the said *Victor Alexander Montagu* the usual power of distress and right of re-entry (that is to say) power of distress in case the said annuity or yearly rent or sum of £1000 shall be in arrear for the space of twenty-one days, and right of entry in case same shall be in arrear for the space of thirty-one days: Provided always, that nothing herein contained shall be construed or taken to prevent or hinder the said *John William* Earl of *Sandwich* from at all times during his life dealing with the real estate of or to which he shall for the time being be seised or entitled, and every or any part thereof as fully and effectually in all respects as he might have done if these presents had not been executed, or (so only that sufficient real estate be left charged with the said annuity or yearly rent or sum of £1000) from devising any part or parts of the said real estate free and clear from all liability in respect of the said annuity, provided his intention to exonerate such part or parts of the said real estate from liability be in such devise clearly expressed."

By his will dated the 24th of August, 1882, the late Earl of *Sandwich* devised "all his manors, messuages, lands and hereditaments situate in *England* and *Ireland* and elsewhere, being freehold, but subject to the charges and incumbrances thereon, to the use of" his eldest son, the Defendant, for life, with remainder to the use of his first and other sons in tail male successively, with

remainder to the Plaintiff for life, with remainder to his first and other sons in tail male successively. And the testator declared that the estates and interests limited to the Defendant and his sons in tail male were so limited on condition that the Defendant should settle all the estates and hereditaments to which at his death the testator should be entitled, either as tenant in tail or in possession, or for an absolute estate or interest in fee simple, or for lives or years, under his marriage settlement dated the 3rd of May, 1839 (subject to all charges and incumbrances thereon) to the uses of his will. Out of a sum of £67,670 *London and North Western* stock, the testator bequeathed a legacy of £50,000 to the Plaintiff, a legacy of £25,000 to his son *Oliver George Poulet Montagu*, and the remainder to the Defendant. He apportioned a sum of New £3 per cents among various legatees, giving the Plaintiff £2000, and his son *Oliver* £1000; and he bequeathed his residue between his two younger sons. The testator made a codicil dated the 9th of September, 1882, by which he bequeathed out of a sum of £20,000 certain legacies, and gave the residue to his two younger sons. And in case he succeeded to a sum of £163,000 on the decease of the Duke of *Cleveland*, he gave to each of his three sons £50,000, and the remainder of the £163,000 between his wife and two daughters.

At the testator's death the only charge, other than the Plaintiff's annuity of £1000, on the testator's real estate was a mortgage of £4842 5*s*. (part of a mortgage of £40,000, the rest of which had been paid off), the mortgage for the balance remaining due being vested in a trustee for the testator himself.

The testator's youngest son, *Oliver George Poulet Montagu*, became entitled to property to the value of about £15,000 under the will of his grandmother the widow of the 6th Earl of *Sandwich*, who died in 1862.

The annuity was paid to the Plaintiff by his father down to the date of his death.

The Plaintiff claimed a declaration that under the indenture of the 26th of November, 1867, the real estate of which the late Earl of *Sandwich* died seised in fee simple was the property primarily charged with the annuity of £1000 covenanted to be paid to the Plaintiff, and that the legacies given to the Plaintiff

C. A. 1886

MONTAGU v. EARL OF SANDWICH.

by his father's will were not bequeathed to him in satisfaction of the annuity, and consequential relief.

The action came on to be heard before Mr. Justice *Pearson* on the 15th of April, 1885.

*Cozens-Hardy*, Q.C., and *Methold*, for the Plaintiff:—

The effect of the deed of covenant was to create a charge at the testator's death of the annuity on the testator's real estate in exoneration of the personal estate; and as the testator devised his real estate subject to all charges and incumbrances, he must have had in his mind that charge, which in effect was at the time of his death the only charge on his real estate. The whole circumstances of the case rebut the presumption against double portions, especially considering that the prior benefit is conferred not by a will, which from its nature the testator could revoke, but by a deed which the covenantor could not revoke or alter *ex mero motu*. The question is what did the testator intend? In considering what he did mean it is to be noted that he must have had in his mind the deed of covenant under which he was paying down to his death the annuity, and what the circumstances of the family were, which were such that he would be likely to benefit his second son largely: *Bellasis* v. *Uthwatt* (1); *Goodfellow* v. *Burchett* (2); *Lord Chichester* v. *Coventry* (3); *Lethbridge* v. *Thurlow* (4).

*Napier Higgins*, Q.C., and *Nalder*, for the Defendant:—

The presumption is that a father did not intend to give his child two portions. In this case there are no sufficient circumstances to rebut that presumption, both benefits are money benefits. An annuity is capable of being satisfied by a gift of a lump sum of money. The testator has not shewn any express intention, or given any intimation in his will from which the Court will presume an intention to give both benefits: *Hinchcliffe* v. *Hinchcliffe* (5): *Cooper* v. *Macdonald* (6); *Dawson* v. *Dawson* (7); *Bethell* v. *Abraham* (8); *Ackworth* v. *Ackworth* (9); *Earl*

(1) 1 Atk. 426.
(2) 2 Vern. 298.
(3) Law Rep. 2 H. L. 71.
(4) 15 Beav. 334.
(5) 3 Ves. 516.
(6) Law Rep. 16 Eq. 258.
(7) Ibid. 4 Eq. 504.
(8) 3 Ch. D. 590, n.
(9) 1 Bro. C. C. 307, n.

*of Durham* v. *Wharton* (1); *Chaplin* v. *Chaplin* (2); *McCarogher* v. *Whieldon* (3).

PEARSON, J. :—

I shall not trouble you Mr. *Hardy*. This case has been argued at so much length, that I think all the cases which bear upon it have been cited to me, and if I thought any further argument would alter the opinion I have formed, I would hear it.

I confess in respect of the difficulties of the case, that I do not see my way out of the conclusion at which I have arrived. It appears that in the year 1867, upon the occasion of the marriage of the Plaintiff, his father made a provision which is certainly not in the form in any respect in which such provisions are usually made by fathers upon the marriage of their sons. [His Lordship read the deed of covenant, and proceeded :—] Now I will stop there and consider upon the face of that deed what appears to have been the intention of the Earl in granting the annuity in the manner and form in which it is granted by that deed, and, to my mind, the conclusion to be drawn from the very peculiar provisions of this deed is this, that the testator intended to charge his real estate with this annuity of £1000 a year, and to keep his personal estate entirely free from it, so as to leave him at liberty as long as there was real estate sufficient to pay the annuity, to dispose of that personal estate as he pleased. He could not have used more express words than he has used to shew that he intended the burthen of his annuity, as between all persons who might under any circumstances become entitled to the real estate of which he died possessed, to fall upon the real estate in exoneration of the personal estate, and although he reserved to himself the power to deal with his real estate during his life as he pleased, it is curious that when he comes to deal with his power of devising, he limits his power of devising to this, that he must leave sufficient real estate subject to the annuity. Both that, and the previous part of the deed, convince me that it was the intention of the grantor of this annuity to leave to himself an unlimited power of disposing of the personal

(1) 3 Cl. & F. 146. (2) 3 P. Wms. 245.
(3) Law Rep. 3 Eq. 236, 243.

C. A. 1886 MONTAGU v. EARL OF SANDWICH. Pearson, J.

estate, provided (as in event happened) that there was real estate sufficient to satisfy the annuity; and I think that I am entitled to look, to a certain extent, to the circumstances of the Earl, and to take into my consideration that he had abundant real estate to satisfy the annuity both when he entered into this deed of covenant and when he made his will, some fifteen years later. Having so done, he makes his will.

Now he makes his will in this way; he devises to his eldest son all his manors, messuages, lands, and hereditaments situate in *England* and *Ireland*, and elsewhere, being freehold of inheritance (but subject to the charges and incumbrances thereon) to the use of his eldest son for life, with limitations over to his children, and, in default of children, limitations over to the younger son, and there is contained in this will a very curious provision: "Provided always, and I declare, that the estates and interests hereinbefore limited and given to my eldest son and his sons in tail male in my real estate" (I am reading it shortly), "are so limited and given on this express condition, that my eldest son shall within eight calendar months after his, the testator's death, settle and assure all the real estate which he takes under my marriage settlement to the same uses and trusts." Now I say, the will containing that provision, it is impossible to suppose that the Earl had not his mind alive to exactly what it was that his eldest son would take, and if he was minded to put in so strict a clause as this, compelling the eldest son, within eight months, to resettle all the family property comprised in the marriage settlement of the Earl, if he had intended that the second son should give up this annuity which was charged upon the real estate of the eldest son, nothing would have been easier, nothing would have been more natural than for the Earl to have put in a clause that in consideration of the benefits given to the second son under this will, he should exonerate the real estate devised to the eldest son from the annuity of £1000 a year. He then proceeds by his will to dispose of the personal estate, and he divides it in various ways amongst his children and his wife, and he adds a codicil to his will by which he disposes of further personal property that might come unto him under some reversionary interest which he took, or supposed that he took. In no

part of the will in which he disposes of the personal estate does he anywhere hint that the personal estate given to the second son is given in satisfaction of the annuity of £1000 a year. That is the case upon the deed and upon the will.

When I come to consider the law of the case, without going into all the distinctions which have been taken from different cases, I may state in favour of the Earl, that I agree with the argument of counsel to this extent, that there is a leaning in this Court against double portions to begin with; and, secondly, I agree also with this, that a large sum of money, like £80,000, given to the second son, might have been taken, and, under the circumstances, would have been considered by this Court as a satisfaction for an annuity of £1000 a year simply given to him for life. But the question that I have to decide is this, whether or not upon the face of these instruments I can find that the benefits given to the son by the will were intended to be a satisfaction of this annuity, or whether I can find indications to shew that they were intended not to be a satisfaction of the annuity, because, undoubtedly, the presumption against double portions may be, and has, in numerous cases, been rebutted by indications to the contrary.

Now I have pointed out that under the deed to my mind the intention of the Earl was to keep the disposal of his property absolutely in his own hands; that he intended to make this £1000 a year given to his son a charge upon the real estate, and upon the real estate practically only. There is no doubt that if there was no real estate, the covenant would have been enforcible against the personal estate; but the intention of the testator was that the £1000 a year should be paid out of the real estate. Did that intention remain when the Earl made his will?

Now I find that he devises the estate to his son, subject to the charges and incumbrances thereon, and in fact this was the only charge thereon, because the only other semblance of a charge upon it was the residue of a mortgage of £40,000, which was vested in a trustee for the benefit of the Earl. That was no charge really upon the estate. It is said that because the words "charges and incumbrances" are in the plural, because the words "charges and incumbrances" are used in the

C. A. 1886 MONTAGU v. EARL OF SANDWICH. Pearson, J.

later part of the will with regard to charges and incumbrances created with reference to property comprised in the marriage settlement, as to which I do not know whether there were any such charges or incumbrances or not; that, therefore, this is not an apt expression with regard to the annuity of £1000 a year. To my mind the simple fact that the words "charges and incumbrances" are in the plural cannot by possibility abrogate from the force of those words, and it is hardly possible, when you come to know that this was the only charge upon the property devised to the present Earl for life, to suppose that that could have crept into this will, if it was not the intention of the testator to keep alive this annuity of £1000 a year. It is hardly possible to conceive for what purpose they should be there if the testator did not intend that the £1000 a year should be paid by the present Earl out of the real estate. Is there anything unnatural, looking at all the circumstances of the case, so far as they are detailed to the Court (and the Court is in possession of them), in coming to the conclusion that the Earl intended that the £1000 a year should remain and be paid, notwithstanding the gift of the £80,000 to his son?

Now, to begin with, upon the face of the will one cannot help seeing that the second son, the Plaintiff, was a favoured son. He takes larger benefits than his brothers in the personal estate. In the next place, to my mind, the explanation is this: the £1000 a year had been given upon the marriage of the son; the father had paid it himself during his life; he looked upon it as a provision for the son as a married man; the benefits that he was giving to him were benefits outside that altogether, not benefits given to him for the benefit of himself and his wife and his children in express terms, although of course a benefit given to the son would be, if he was a sensible man, a benefit to his wife and his children also, but they are benefits given to his son under the power which the father retained to himself of disposing as he pleased, outside the deed, of his personal estate.

Taking all these circumstances into consideration, I think it is impossible fairly to construe the deed and the will, without seeing that I should be going contrary to the only conclusions that I can draw from the framing of both of these instruments if

I were to decide that the £80,000 was a satisfaction of the annuity of £1000 a year; and inasmuch as all these cases are cases which are to be decided on intention I find that the intention of the testator was, as expressed upon these two instruments, that the £80,000 should not be a satisfaction of the £1000 a year, and I must so decide it.

C. A. 1886 MONTAGU v. EARL OF SANDWICH.

D. P.

From this decision the Defendant appealed, and the appeal was heard on January 19th and 20th, 1886, when the arguments used and authorities cited in the Court below were again made use of, and the following additional arguments took place.

C. A.

Sir *H. Davey*, Q.C., S.G., and *Nalder*, in support of the appeal:—

There is absolutely nothing in this case to rebut the rule against double portions except the words in the devise "subject to the charges and incumbrances thereon." And these words are far too vague and general to rebut this well-established rule, particularly in a case like the present, where "the obligation is earlier in date than the will," and "the testator when he makes his will is under a liability which he cannot revoke or avoid": *Tussaud* v. *Tussaud* (1); *Trimmer* v. *Bayne* (2). Moreover there was an existing charge by way of mortgage to satisfy these words; and if by the operation of the presumption against double portions the annuity is satisfied then there remains nothing to be charged in respect of it. Again, the covenant was not to charge "all his real estate," but only "a sufficient part of it." It is only a covenant to do an act whereby a charge shall be created upon something, and it does not create a certain charge upon anything: *Countess of Mornington* v. *Keane* (3).

[They also cited *Leighton* v. *Leighton* (4), and *In re Pollock* (5).]

*Rigby*, Q.C., *Cozens-Hardy*, Q.C., and *Methold*, for the Respondent:—

The covenantor at the outset of his covenant states that its

(1) 9 Ch. D. 363, 380.
(2) 7 Ves. 508.
(3) 2 De G. & J. 292, 313.
(4) Law Rep. 18 Eq. 458.
(5) 28 Ch. D. 552.

C. A. 1886 MONTAGU v. EARL OF SANDWICH.

operation shall be to charge the real estate of which he shall die seised; and he cannot be deemed to have exonerated it by implication, or otherwise than by clear expressions in the devise of that which he has been careful to charge. In questions of construction recourse should be had to presumptions only when all other sources of intention have failed. And this is not a simple case of double gift and nothing more; for there is here ample evidence to shew that the presumption cannot apply. There is, first, the charge on the realty in exoneration of the personalty of the covenantor, then the devise by him subject to the charges and incumbrances, and then his gift to the Plaintiff of the personalty, a fund laboriously kept distinct from the realty, and with which the annuity has nothing to do. The case is in fact governed by *Lord Chichester* v. *Coventry* (1) and *Lethbridge* v. *Thurlow* (2). If the annuity was not a "charge" it was an "incumbrance," and it is unnatural to suppose that the testator would have used the language he has in mere reliance upon a presumption of which he was probably ignorant.

[They referred also to *Holroyd* v. *Marshall* (3).]

Sir *H. Davey*, in reply:—

It is not a question of the fund out of which the annuity is payable. The gift out of the personal estate has superseded and extinguished the charge (if any) on the realty, and the annuitant takes that in lieu of the annuity.

1886. March 9. COTTON, L.J.:—

This is a case in which there is a short and nice point to be decided, and no disputed facts. The question is, whether *Victor*, one of the sons of the late Earl of *Sandwich*, is entitled not only to an annuity of £1000 a year given to him on his marriage by his father, but also to the benefits given to him by his father's will.

Now, if the testator had not been a father, or a person in the position of a father, there would have been no question; but as between father and son the presumption arises that a father does

(1) Law Rep. 2 H. L. 71. (2) 15 Beav. 334.
(3) 10 H. L. C. 191.

not intend to give double portions to his children; that is to say, if a father has made a provision by way of covenant in favour of his child before the date of his will; then unless it appears upon the will or by parol testimony (which in such cases is admitted in rather an anomalous way in order to rebut the presumption) that he intends to give the benefit conferred by will in addition to that which is already secured to the child by covenant, then the child will not take both. In other words, the benefit given by will is presumed to be given on an implied condition that if the son takes it he must give up and surrender that which has been already secured to him by covenant. The same presumption arises in another form where the father by his will gives a benefit to a son, and afterwards on his marriage, or upon some other event, makes a settlement upon him; and there again the later provision is considered as an ademption of the previous gift by will, unless it can be seen, either by parol testimony as to the intention of the father, or by something appearing upon the documents, that the son is intended to have both. That, then, is the case we have to deal with; and as there is no parol testimony as to what the intention of the father when he made his will was as regards the two provisions, we must see whether on the face of the will (of course having regard to the nature of the previous provisions made for the son) there is sufficient to shew an intention on the part of the father to give the son the benefits under the will as an addition to what he has already secured to him by the covenant.

There was a good deal of argument upon the deed of covenant, but in my opinion, except for the purpose of considering whether there was a charge on the real estate of the father, the provisions of the deed are unimportant. The gifts to the son by the will were absolute gifts. The £1000 a year secured to him by the deed was only a life annuity. No question arises here as to any difference between the way in which the two provisions are respectively settled; and we must look at the will. It is conceded on both sides (and in my opinion it is the true view) that there is only one provision in the will which can be relied upon as an indication of intention that the son should have both the benefits, and it is conceded also that the income from

C. A. 1886 MONTAGU v. EARL OF SANDWICH. Cotton, L.J.

the benefits under the will would be much more than £1000 a year.

Now the provision relied upon in the will is that by which the testator devises all his real estate in *England* and *Ireland*, "but subject to the charges and incumbrances thereon," to his eldest son and his assigns for his life, with remainders over. There is nothing material in the form of the gift to the Plaintiff, the younger son, which is simply a gift of so much of certain funds. It was argued that the £1000 a year was secured not only by covenant but by a charge on the real estates of the testator, and that when the testator in terms devised his real estates "subject to the charges and incumbrances thereon," that was a sufficient indication of his intention that the charge of £1000 a year was to be paid to the Plaintiff, and that he should have both benefits.

Then of course comes the question whether the £1000 a year was or was not a charge on the testator's real estate. But assuming for the present that it was, in my opinion these words "subject to the charges and incumbrances thereon," are not sufficient to shew an intention that the younger son should have both benefits.

I know that, unfortunately, one of my colleagues differs from me, but in my opinion so to hold would be to give the rule to which I have referred such a minute effect as practically to do away with it; and that I think we are not justified in doing. There is here no sufficient reference to the £1000 a year given to his son, but only the general words "subject to the charges and incumbrances thereon," that is on his real estate which may be existing at the time of his death. It was said that unless this is considered as specially referring to the charge of £1000 a year for the Plaintiff, the clause is rendered inofficious: and that it is the rule that effect ought to be given to all the words in a will. But it is not the fact that there is only one charge as to which it could have effect. If the £1000 a year was a charge, there were really two charges; that one and an ordinary charge by way of mortgage on which between £4000 and £5000 was due; and if the expression had been "subject to the charge and incumbrances" it would have been more specific and more pointedly directed to the charge of £1000 a year in favour of the son; but

having regard to the other charge, the words really produce no effect. For, in my opinion, it would be wrong to treat these general words (which according to the then state of the law would be inoperative as regards one of the charges) as shewing the father's intention that as regards the son's charge, that son should, notwithstanding the presumption against double portions, have both the benefits given him by will and the benefit secured to him by that charge. Great reliance was placed upon the judgment of the House of Lords in *Lord Chichester* v. *Coventry* (1), where it was said the circumstances of the gift to the daughter were analogous to the condition "subject to the charges and incumbrances thereon" in this case. But the decision there was very different. In that case the gift by will was of a share in the division of residue, and after payment thereout of all debts, and their Lordships relied upon this, that the provision made for the daughter was a debt, and that the debts were all to be paid before the residue was divided, and accordingly that the shares of the ultimate residue could not be given on an implied condition that the daughter should give up the claim to her debt. And I doubt whether if there had not been the direction to pay debts before the gift of the residue they would have come to that conclusion. The Lord Chancellor, Lord *Chelmsford*, in his judgment, recognises the rule to which I have referred, and says (2):—"In determining in any particular case whether a gift by a parent, or a person *in loco parentis*, is intended to be an addition to, or in substitution for, a prior gift by the same person, it must always be borne in mind that there is a presumption, or, as Lord *Eldon* expressed it in *Ex parte Pye* (3), 'a sort of feeling upon what is called a leaning against double portions.'" Then he quotes Sir *John Leach*: "'This presumption may be repelled or fortified by intrinsic evidence derived from the nature of the two provisions. Where the two provisions are of the same nature, or there are but slight differences, the two instruments afford intrinsic evidence against a double provision. Where the two provisions are of a different nature, the two instruments afford intrinsic evidence in

(1) Law Rep. 2 H. L. 71. (2) Law Rep. 2 H. L. 83.
(3) 18 Ves. 140.

C. A. 1886 MONTAGU v. EARL OF SANDWICH. Cotton, L.J.

favour of a double provision.'" Then Lord *Cranworth* says (1): "Neither party in the argument of this case disputed the rule acted on in Courts of Equity, that there is a presumption against double portions. I have more than once had occasion to express my opinion that this is a useful rule, carrying generally into effect the intention of parents and others making provision for those for whom they are bound to provide."

So both their Lordships fully recognise this rule, although they do perhaps use expressions more easily departing from it than other Judges have done; and there are undoubtedly circumstances in that case very different and stronger than such slight evidence of intention as is shewn by the words in this case "subject to the charges and incumbrances thereon." As there is this rule against double portions, and we cannot put an end to it, it is much better that the rule, if a bad one—Lord *Cranworth* says it is a good one—should be put an end to by legislative enactment or otherwise, than that we should reduce it to nothing by departing from it on such very slight grounds as exist in the present will; and it will be remembered that Lord Justice *Turner*, whose decision in *Coventry* v. *Chichester* (2) was affirmed by the House of Lords, said that there must be strong evidence upon the instrument to enable the child to get the double portion.

Then we come to the question whether the £1000 a year was a charge upon the real estate of the testator, and although what I have already said has disposed of the case, I think it will be right that I should give my opinion upon this point. In my opinion this £1000 a year was not a charge at all. [His Lordship then referred to the terms of the covenant and continued:—]

To my mind this instrument clearly contemplates that either the Earl or his heir should execute another instrument in order to give *Victor*, the son, the security which he intends him to have. It is not that this deed is to be the only security, but he covenants that he or his heirs shall execute the charge, and that is to be a charge, not upon the whole of the real estate of which he dies seised, but on a sufficient part thereof. I think it is an established rule, that where the covenant is to charge real estate, which can be ascertained by existing facts and circumstances, for example

(1) Law Rep. 2 H. L. 86. (2) 2 D. J. & S. 336, 345.

if there is a covenant to charge all the real estate which a man has at a particular time, that covenant will itself make a charge. But where the covenant is to charge, not all or any definite portion of a man's estate, but only that which is worth £1000 a year, or which would be sufficient to secure £1000 a year, then from the indefiniteness of the matter referred to there will be no charge unless an instrument is afterwards executed to give effect to the covenant; and it remains simply a covenant to be enforced as against the assets of the covenantor. I may refer in support of this view to the case of *Countess of Mornington* v. *Keane* (1) The words there were different, and there were, I think, covenants to secure a certain sum, either by charge on the settlor's assets or by definite security, but the Lord Chancellor and the Lords Justices deal with the question as to whether a covenant to charge will itself be a charge. The Lord Chancellor says this (2), "The other cases which were referred to seem to me not to bear out the proposition in support of which they were cited, with the exception of *Roundell* v. *Breary*." (3)—that is afterwards explained from the special circumstances, the Registrar's book being produced by Lord Justice *Turner*—"For, with that exception, they were generally cases where specific lands were pointed to, as in *Metcalfe* v. *Archbishop of Canterbury* (4), and *Watson* v. *Sadlier* (5). So in *Lyde* v. *Mynn* (6), where an annuity was to be charged on such property as the covenantor might have at a particular time, which is clearly specific property. The observations in *Freemoult* v *Dedire* (7) render that case, as it appears to me, an important authority, as exhibiting the distinction between a covenant to charge specific lands and one to charge lands generally. There the testator had covenanted to settle his lands in *Romney Marsh*, and also lands that should be of the value of £60 per annum, upon his wife for her life; and it was held that the former part of the covenant created a charge, and that the latter did not." Why? Because it was not all his lands at a particular place, or all his lands except lands in a particular place, but lands of the value of £60 a year, and that could not be ascertained without evidence,

(1) 2 De G. & J. 292.
(2) Ibid. 315.
(3) 2 Vern. 482.
(4) 1 My. & Cr. 547.
(5) 1 Moll. 585.
(6) 1 My. & K. 683.
(7) 1 P. Wms. 429.

C. A. 1886 MONTAGU v. EARL OF SANDWICH. Cotton, L.J.

and therefore left the lands indefinite. Accordingly Lord Justice *Turner* (1) says this:—"Cases like the present resolve themselves into this question,—Is there, or not, an agreement to charge the property against which the claim is sought to be enforced either by the terms of the covenant or by virtue of any act in performance or satisfaction of the covenant? The question whether there is an agreement by the terms of the covenant depends on the language of the deed; and in considering that question, it has always appeared to me of great importance to see whether the deed is to have immediate operation, or whether the covenant is to have operation by any future act to be done by the covenantor, for if the latter be the case, all turns on the question in what mode the future act is to be done, and how the property is to be affected by the future act," and then (2), after referring to the contention of the plaintiff, he says: "I believe that there is no case in which a lien has been held to be created by a covenant to charge property not defined by the covenant, and where there has been no acquisition of property with intent to perform the covenant."

So here the covenant is, in my opinion, a covenant to charge by a subsequent deed lands of the value of £1000 a year, and the charge is to be not upon all the lands of the settlor, but upon lands to be ascertained by evidence. I must not omit here to notice the two provisoes which were so much relied upon as shewing that there was a present charge. One was that the deed should not be construed to hinder the covenantor "from at all times during his life dealing with the real estate of or to which he shall for the time being be seised or entitled." Now as the charge was only to be on lands which he had at his death, it is certain that even if there was the charge, it could not affect any lands which he might sell before his death, and I take it the meaning of that was this:—If I sell my land so as not to leave sufficient for my heir to charge it must not be taken as a breach of the covenant by me. The other proviso that Lord *Sandwich* might devise the real estate free from the annuity "so only that sufficient real estate should be left charged with the said annuity," was relied on as shewing that the land would still remain charged, notwith-

(1) 2 De G. & J. 317. (2) 2 De G. & J. 318.

standing the benefits given by the will to the younger son, because it was said the lands must be charged unless they are in terms exonerated. But if the will is to be governed by the presumption to which I have referred, the son would be put to his election and would give up his charge if he chose to take what is given to him by the will. This proviso only provides for a case where the charge is not in any way satisfied, either by the son having the same thing given to him in another way, or by his electing to take what is given to him. I cannot say that this proviso is very skilfully drawn, but I think it may have been intended to provide for this, that in case Lord *Sandwich* did execute a charge during his lifetime, notwithstanding that, if he left sufficient to meet the £1000 a year, he still might by will devise even part of that land which he had charged, provided he clearly expressed his intention to exonerate it.

I have thought it right to give my opinion upon this deed, because this is an important matter; and of course if there is no charge the whole of the argument as to the son taking double portions falls to the ground. But in my opinion, even if the £1000 a year were a charge, the presumption cannot be rebutted by those words, "subject to the charges and incumbrances thereon." In my opinion, therefore, the decision in favour of the Plaintiff was erroneous.

BOWEN, L.J.:—

If any difficulty has arisen in this case, it is from the obscurity of the two documents which we have to construe. We have to apply to the deed of 1867 and to the will of the testator the doctrine of double portions. The presumption against double portions, is a presumption which arises from the view taken by those who invented it as to the supposed intentions of parents, in a society and under modes of life like ours, when making provision for their children.

Now it is an extremely difficult doctrine to apply. As it arises from a view as to what is in general the intention of a parent, and is a rule invented to protect that intention, the justice of applying it depends necessarily on the probability of the particular testator recollecting the rule when he makes his will.

C. A. 1886 MONTAGU v. EARL OF SANDWICH. Bowen, L.J.

Now Lord *Cranworth* says this is a valuable rule, and I have no doubt it is; but I cannot help myself believing that it is in its origin a judge-made rule of construction, and introduced into the law with some benevolent idea of protecting the supposed wishes of parents. But still it is a rule which one finds embedded in the law, and the last thing which I propose to do is to attempt to fritter away a rule which I find established by the authority of those who are wiser than myself.

In this particular instance we have to apply it to the case of an obligation created by a previous settlement. How is an obligation created by a previous settlement to be satisfied? It can only be satisfied in one of two ways—either by a man's performing his obligation, or by his doing something which is received by the person who is entitled to the benefit of the obligation in accord and satisfaction of it. In the case of an obligation under a settlement, and of a subsequent gift by will, the only form the accord and satisfaction can take is that of a gift coupled with an implied condition, that, if it is taken by the donee, he will take it in satisfaction of the obligation. We have therefore to discover some such provision as this in the four corners of the will, after reading it with our minds full of the consciousness of this presumption against double portions. The present is not a case in which we can discover what the testator intended by any oral evidence. There is none. We really therefore have to construe the will by the light of the previous settlement and the surrounding circumstances, with the view of making up our minds whether there is sufficient to shew that the testator did not intend the provisions made by the will to be in lieu of that made by the settlement; or, in other words, did not intend by the provision made under the will to satisfy his obligation under the settlement. Is there anything to shew that the testator did not mean the legatee to elect whether he would take the legacy under the will in satisfaction of the provision made under the settlement. When we come to the will, it seems to me that the only real evidence upon which any reliance can be placed which might tend to shew the testator did not intend the usual rule to apply is the presence in the will of the words: "Subject to the charges and incumbrances thereon" in the devise of his real estate to the use of his eldest son.

Now, first of all, had the settlement previously created a charge? And, though I feel much reluctance in ever venturing to differ from so great an authority as my learned Brother Lord Justice *Cotton*, still the inclination of my mind certainly is, that a charge had been created by the previous settlement—that the previous settlement does not merely contain a covenant that the testator would charge the annuity which he creates on a sufficient part of the real estate of which he should die seised in fee, leaving it uncertain what portion of his estate would be so charged, but that he expresses his intention at the same time that the covenant to charge a sufficient portion of his estate should operate also as a charge to take effect upon his death upon the whole. It is an extremely obscure document, but, upon the whole, that seems to me to be the true effect of the way in which the covenant is expressed, coupled with the proviso which follows it. I point in support of that view to the words with which the covenant begins, namely, that Lord *Sandwich* does hereby "so as to render the real estate (if any) of which he shall die seised in fee the fund primarily liable," covenant with the Plaintiff. He does not merely covenant that he will at some future time do something which will have that effect. When you pass on to the proviso, there are words in it which provide that nothing therein contained shall be taken to prevent Lord *Sandwich* dealing with his real estate during his life, which seems to indicate, at all events, an impression that something, but for the proviso, might operate to prevent him from doing so. And when you come in the latter portion of the proviso, to the words which say that nothing shall prevent him from devising any part of the real estate free and clear from all liability in respect of the said annuity, you find the condition made that sufficient real estate is to be left charged with the annuity, and that the intention to exonerate such part of the real estate shall be clearly expressed. I feel great doubt and hesitation upon the matter, but, upon the whole, I think that the testator intended that there should be a charge, and that there should be something more than a present covenant to create a charge on a part of the property to be afterwards ascertained.

Next, assuming that the words of the settlement create a

C. A. 1886 MONTAGU v. EARL OF SANDWICH. Bowen, L.J.

charge, what are the words in the will? The words in the will devise the lands and hereditaments of the testator to the use of his son "subject to the charges and incumbrances thereon." Those are general words placed in the will, looking forward, no doubt, to the day of his death, and, in one sense, intended to speak from the day of his death. But can the use of such general words as these afford any indication that the testator thought or intended that at the future date of his death there would or should still be a charge upon his property? It seems to me that the words are too general for that, and that they do not indicate any intention to retain any charge at all, but simply provide for the contingency of charges existing at the time of his death, a contingency which might be fulfilled by a number of events happening after the date of the will and before the date of the death; and they are, therefore, in no sense evidence that the testator regarded this particular charge which he created by a settlement as likely still to subsist. Now, whatever may be the view to be taken of the rule against double portions, which Lord *Cranworth* says is a good rule, it is a rule that exists; and there is nothing worse than frittering away an existing rule. It seems to me, though I speak with great hesitation, that there is really nothing substantial in this will to lead one to the view that the testator did not intend what the rule of law says he shall be presumed to have intended.

Feeling no confidence that in applying this doctrine of double portions in this particular case we are giving effect to the real intention of the testator, feeling no confidence at all myself that this presumption, when applied in this particular case, may not be absolutely leading us away from the true wish of the testator, yet it seems to me it would be wrong to break through precedent, and I record my judgment accordingly in favour of the appeal as a sacrifice made upon the altar of authority.

FRY, L.J.:—

This case presents, to my mind, two questions, the first of which is whether the covenant in the deed of the 26th of November, 1867, did or did not create a charge and interest on the real property of the covenantor. Now, when one comes to look at the

covenant, no doubt the instrument is very obscure. The actual operation of the covenant is that the covenantor agrees that he will charge the annuity on a sufficient part of the real estate of which he shall die seised, but, as has been already observed by Lord Justice *Bowen*, the covenantor expressly declares that he enters into this covenant so as to render the real estate, if any, of which he, the Earl, shall die seised in fee, the fund primarily liable for the satisfaction or discharge of this covenant. But, if primarily liable, it is obvious that it is rendered liable; and therefore I find an express declaration of intention that this covenant, the covenant to charge an adequate part, is to render liable the entirety of the estate of which the testator shall die seised. That appears to me to have this operation, that it charges the entire estate of which the testator dies seised until the execution of a new instrument which shall charge an adequate part afresh, and thereby discharge the remainder of that which is primarily charged. That appears to me to be the natural construction and meaning of this portion of the covenant, and in this conclusion I am strongly fortified by the proviso which follows, that it is not to be taken to prevent the Earl "from at all times during his life dealing with the real estate of or to which he shall for the time being be seised or entitled," which imports the notion that but for it the Earl would have been fettered in the dealings during his lifetime with the real estate of which he was possessed. And further, the words importing the condition ("so only that sufficient real estate be left charged with the said annuity") refer to the real estate which is not specifically devised as being left charged. The charge is not now created *de novo*, but the property remains subject to the charge previously created, and even if there be a specific devise that specific devise is to be accompanied with an expression of intention to exonerate the part so specifically devised from liability. It is obvious therefore that the covenantor considered that but for this proviso the entire real estate is onerated with the liability, and if onerated with the liability it appears to me it was charged. Therefore, although I am bound to admit that the document seems to me clumsily conceived and ill expressed, and although I need not say that I differ from Lord Justice *Cotton* with great hesitation, yet my

C. A. 1886 MONTAGU v. EARL OF SANDWICH. Fry, L.J.

opinion is that this instrument intended to create a charge, and did create a charge.

The next question arises upon the application in this state of circumstances of the words of the will of the testator which was made in the year 1882, and therefore many years after the covenant had been entered into. It appears that at the time the testator made his will there were only two charges on his property, one this charge which had been created by the deed of covenant, and the other a mortgage which had been created under some settlement. I do not myself rely upon the words "subject to the charges and incumbrances thereon" as referring expressly to the particular charges then existing, but before explaining the view which I take of these words I desire to point out that it is a case in which the portion precedes the will, and in which, therefore, the provision made by the will and the legacy conferred by the will can only be taken in satisfaction of the portion previously covenanted to be secured, upon the doctrine of election.

Now the difference between cases of this class and cases in which the will precedes the settlement or gift of the portion, is very obvious, and has often been insisted upon. The particular way in which the presumption against double portions applies to a case like the present is by the implication or introduction by presumption of a condition, which is of course not expressed, that the legacy given by the will shall be taken in satisfaction of the covenant. That was plainly expressed in the judgment of the Court of Appeal, delivered by Lord Justice *Cotton* in the case of *Tussaud* v. *Tussaud*, in which he says this (1): "Where the obligation is earlier in date than the will, the testator, when he makes his will, is under a liability which he cannot revoke or avoid. He can only put an end to it by payment, or by making a gift with the condition, express or implied, that the legatees shall take the gift made by the will in satisfaction of their claim under the previous obligation." It has accordingly been held by the House of Lords in the case of *Lord Chichester* v. *Coventry* (2) that, in the case of the satisfaction of the portion previously secured by a will, slighter circumstances are adequate to repel the presumption against double portions than they are in the case in which the gift by

(1) 9 Ch. D. 363, 380. (2) Law Rep. 2 H. L. 71.

way of settlement follows the will. Lord *Chelmsford*, making the first speech in the House of Lords upon the appeal, said (1): "But where an irrevocable settlement is followed by a will, it is not so easy to infer that an additional benefit was not intended by the testator, except where he expressly declares his intention to be otherwise, or where the gift in the will and the portion in the settlement so closely resemble one another as to lead to a reasonable intendment that the one was meant to be substituted for the other." And again, Lord *Cranworth* in addressing the House of Lords uses this language (2): "In such a case"—that is a case where the portion precedes the will—"he can only make the testamentary gift a substitute for what he was by deed bound to provide, in case those entitled under the settlement see fit so to accept it. The application of the rule is thus made more difficult; still there is no doubt that the rule itself is held to be applicable in the latter as well as in the former case." Then, again, he says a little lower down: "When the will precedes the settlement it is only necessary to read the settlement as if the person making the provision had said, 'I mean this to be in lieu of what I have given by my will.' But if the settlement precedes the will, the testator must be understood as saying, 'I give this in lieu of what I am already bound to give if those to whom I am so bound will accept it.' It requires much less to rebut the latter than the former presumption." Then Lord *Romilly* in the same case in addressing the House of Lords says (3): "When a father on the marriage of a child, enters into a covenant to settle either land or money, he is unable to adeem or alter that covenant, and if he give benefits by his will to the same objects, and states that this is to be in satisfaction of the covenant, he necessarily gives the objects of the covenants the right to elect whether they will take under the covenant or whether they will take under the will. Therefore this distinction is manifest." It appears to me, therefore, that the House of Lords, in dealing with a case of this description, consider that much less is required to rebut the presumption against double portions in a case where the settlement precedes the will, than in the case where the will precedes

(1) Law Rep. 2 H. L. 82. (2) Law Rep. 2 H. L. 87.
(3) Law Rep. 2 H. L. 91.

C. A. 1886 MONTAGU v. EARL OF SANDWICH. Fry, L.J.

the settlement. I feel myself bound by this expression of the law in the House of Lords, and I proceed to endeavour to apply it to the will in the present case.

In the first place it must be observed that the will is absolutely silent with regard to any condition imposing election. If it was expressed of course the question could not have arisen.

In the next place it must be observed that, whereas the settlement created an annuity for life, the benefits conferred by the will are in the nature of pecuniary legacies given by the testator, and therefore there is nothing in the nature of the two benefits to suggest that the testator considered the one the same as the other.

But then we still have to inquire whether the testator has in any way repelled the presumption against double portions; because I quite agree with what has been said, that we are not to fritter the rule of law away, and we are bound to find some expression in the will repelling the presumption. Then we come to the words upon which so much of the argument turned, in which the testator declares that the real estate is bequeathed "subject to the charges and incumbrances thereon." Now what is the meaning of those words? It appears to me that they must mean one or other of two things. They must mean either "the charges or incumbrances which may be subsisting thereon at the time of my death," or "the charges and incumbrances which may be subsisting thereon at the time of my death, and not be extinguished by the application of the doctrine of satisfaction to the same." If the words mean the latter they are inofficious and do nothing—they express no intention on the part of the testator, because they only do really that which the law compels. But if on the other hand they be read as an expression of intention that the testator's eldest son should take subject to the charges subsisting at the time of the testator's death, then they have an operation, then they are officious, then they do something.

Now it appears to me that, that being so, the natural and true construction of them is to hold that they mean "subject to the charges and incumbrances subsisting on my real estate at the time of my death." If that be so we have in the same will two declarations of intention, one an intention that the eldest son

shall take the realty subject to the charges thereon subsisting at the time of the testator's death, which included the annuity to his son *Victor*, and, secondly, a declaration of intention that his son *Victor* shall take the pecuniary legacies bequeathed to him.

If that be the true view of the will there was manifestly an expression of intention repelling the presumption that the legacies are in satisfaction of the portion, repelling the presumption against double portions. I need hardly say that, coming to this conclusion I feel it my duty to express it, but, at the same time, finding that my learned Brethren do not think that the words which I regard as an expression of intention are any manifestation of intention, I feel it very difficult to conclude that there is sufficient manifestation of intention to repel the doctrine of presumption against double portions. If the matter had rested with me I should have affirmed the judgment of the Court below, but the result will be that the order of Mr. Justice *Pearson* must be discharged, and the costs which he directed the Defendant to pay to the Plaintiff must be repaid, and the action must be dismissed with costs against the Plaintiff.

Solicitors for Plaintiff: *Jennings, Son, & Burton.*

Solicitors for Defendant: *Collyer-Bristow, Withers, Russell, & Hill.*

W. W. K.

---

## CHAMBER COLLIERY COMPANY *v.* HOPWOOD.



[1885. C. 4993.]

*Easement—Prescription—Artificial Watercourse—Landlord and Tenant—Enjoyment as of Right—Prescription Act* (2 & 3 *Wm.* 4, *c.* 71) [*Revised Ed. Statutes, vol. vii., p.* 223].

The Defendants in 1834 demised to the Plaintiffs the coal under the *C.* estate for fifty years, with powers to sink pits, make soughs, &c., erect engines, and make drains, &c., for supplying such engines with water, and also to do certain other acts on the surface for the better draining and working the demised mines and any other mines of which the Plaintiffs might become lessees under the lands of any other persons. In 1836 the Plaintiffs took a lease for thirty-five years of the *O. Colliery* from a neighbouring landowner. In 1846 the Plaintiffs made a drain about a mile long, chiefly on the *C.* estate, by which they diverted a small natural stream

C. A.
1886
CHAMBER COLLIERY COMPANY v. HOPWOOD.

on the *C.* estate and brought it down to the *O. Colliery*, where they made reservoirs for the water at considerable expense. They did not ask leave to make the drain, but the Defendants' agent saw the work going on and encouraged it. In 1872 the Plaintiffs became owners in fee of the *O. Colliery*. In 1884, when the lease from the Defendants expired, the Defendants stopped the drain and diverted the water. The Plaintiffs, claiming a right by prescription to the water, commenced this action to restrain them from doing so. The Vice-Chancellor of the County Palatine held that the watercourse was made under the powers of the lease and that the right to the water expired at the end of the lease, and he dismissed the action:—

*Held*, on appeal, that this dismissal was right, for that if the making the drain was not authorized by the lease (as to which the Court gave no opinion) it was made and enjoyed, either under the belief of both parties that it was authorized by the lease, or under a comity between landlord and tenant, and that there was no enjoyment as of right so as to give the tenant a right to the water after the lease had expired.

BY indenture dated the 22nd of January, 1834, the predecessors in title of the Defendants demised to certain persons the coal and cannel under two estates near *Oldham* called the *Chamber Hall* and *Yewtree* estates, containing together 164A., 1R., 27P., "Together with liberty, power, and authority to and for the said" (lessees) "their executors, administrators, and assigns to make and sink pits, eyes, drive soughs, tunnels, trenches, roads, and railways, and erect fire and other engines, cottages, smithies, huts, hovels, cabins, wheels, pumps, and other devices, and to collect water and make drains, reservoirs and sluices for the supplying such engines and machines with water, and also to get stone, clay, sand, and gravel, and make bricks, in and upon the said estates, lands, and grounds of them the said" (lessors) "for the better and more effectual draining and laying dry, working, banking and vending the same mines, veins, and beds of coal and cannel, and the mines, veins, and beds of coal and cannel in or under any other lands or grounds belonging to any other person or persons whomsoever of which the said" (lessees) "or any of them alone or conjointly with any other person or persons whomsoever now are or is, or which they or any of them, or any of their executors, administrators, or assigns, shall or may during the term hereby demised become the lessees or proprietors, lessee or proprietor, from and after they or any of them shall become such lessees or proprietors, lessee or proprietor thereof, but not

sooner or before," with certain other surface rights, to hold the above beds of coal and cannel, liberties and privileges for fifty years from the 1st of December, 1834, paying for all coal and cannel raised and sold one-fifth of the selling price. The lessees covenanted to sink within five years one or more shaft or shafts on the *Chamber Hall* estate, and to pay a minimum rent of £1000 if the royalties did not amount to so much. The deed concluded with an agreement "that it shall and may be lawful to and for the said lessees, their executors, administrators, and assigns, to take, use, burn, and consume a fair, reasonable and usual proportion of coal and cannel which shall from time to time be gotten and raised from, forth, and out of the said mines, veins, and beds of coal and cannel hereby demised, and which shall or may be used in working any engine or engines, or the burning of clay into bricks for the purpose of draining, laying dry, and winding up the same mines, veins, and beds of coal and cannel, and with reference to the coals generally which shall be drained or worked by means of such engine or engines, such portion of coal or cannel to be burned or consumed being calculated according and in proportion to the quantity of coal which shall be raised or got under the said *Chamber Hall* or *Yewtree* estates, without making any satisfaction for the same, and whether the engine or engines shall be erected and set up within any of the said estates, lands, and grounds of them the said lessors, or within or upon the lands or grounds of any other person or persons, and of which the said lessees, their executors, administrators, or assigns, shall be the lessees or lessee, proprietors or proprietor."

This lease became vested in the Plaintiffs. In 1836 the Plaintiffs took from a different lessor a lease for thirty-five years of mines near the *Chamber Hall* estate but not adjoining it, and formed there a colliery called the *Oak Colliery*. They commenced their operations there about 1841. In or about 1846 the Plaintiffs constructed a sough of the length of about a mile from a point on the *Chamber Hall* estate down to the *Oak Colliery* and running through the land which lay between the *Chamber Hall* estate and the *Oak Colliery*. The sough received at its upper end the water of a small natural stream known as the *Southern Stream*, which at that point ceased to have a free course and turned the sur-

C. A.
1886
CHAMBER COLLIERY COMPANY v. HOPWOOD.

rounding ground into a swamp. Engineers who had inspected the spot deposed to the effect that if the sough were not there the water of the stream, so far as it was not absorbed by the soil, would find its way downwards in a direction quite different from that of the sough. The object of the Plaintiffs in making this sough was to get a supply of water for their engine at the *Oak Colliery*. The agent who managed the *Chamber Hall* estate saw the making of the sough while it was going on, and told the contractor to go on, for it would improve the land, but there was no evidence that permission from him had ever been asked for. There was evidence that the Plaintiffs went to considerable expense in forming a reservoir at the *Oak Colliery* which was of no use except for storing this water. The Plaintiffs purchased the reversion in fee of the *Oak Colliery* in 1872. In December, 1884, when the Plaintiffs' lease of the *Chamber Hall* coal had come to an end, the Defendants, the then owners of the estate, closed the upper end of the sough and diverted the water into another channel which took it away from the *Oak Colliery*. The Plaintiffs commenced this action to restrain the diversion, contending that they had acquired a prescriptive title to the watercourse.

The Vice-Chancellor of the County Palatine came to the conclusion that the making the sough was within the powers given to the lessees by the lease of 1834, and that therefore the right to use it came to an end at the expiration of the term. His Honour accordingly dismissed the action.

The Plaintiffs appealed.

Sir *R. Webster*, Q.C., *Maberly*, and *Lees*, for the Appellants :—

The lease did not demise the surface, and we contend that the making this sough does not come within the powers of the lease. The use of it was enjoyed for more than twenty years, and there is no evidence of any permission being given, except the permission of the lessors' agent at the time when it was made, and he appears to have approved it, not as sanctioned by the lease, but because he considered the carrying off the water beneficial to the land of the Defendants. On the faith of this permission the Plaintiffs incurred considerable expense.

When a license has thus been given and expense incurred on the faith of it, it is irrevocable. The enjoyment therefore was an enjoyment as of right. There was no permission asked from time to time. In *Tickle* v. *Brown* (1) Lord *Denman* explains the meaning of enjoyment as of right, and in *Gaved* v. *Martyn* (2) it was laid down that where permanent works are constructed which are inconsistent with the idea that the use is of a temporary character, there a title may be acquired by prescription to an artificial flow of water. In *Wood* v. *Waud* (3) the distinction between permanent and temporary watercourses is drawn, and the formation of permanent works for the use of the water is dwelt upon. In *Kinloch* v. *Nevile* (4) it was laid down that parol permission if acted on and followed by enjoyment for twenty years gives a right, though it is otherwise if permission is given from time to time, and many of the cases refer to this distinction. The Plaintiffs, then, are entitled to the flow of water by force of the statute.

*Rigby*, Q.C., *Clare*, and *Bridgeman*, *contrà*:—

It is true that the lease does not demise the surface, but it gives various powers over it. It was the duty of the tenant to keep within those powers, and if he did an act under colour of the lease, it does not lie in his mouth to say that it was unauthorized and gives him a perpetual right against his landlord. At the expiration of a lease it would be most inconvenient that there should be a minute inquiry what acts done by the tenant were justified by it, and that he should be entitled to a perpetual easement in respect of continuous acts which turned out not to be authorized by it. There is a strong presumption that what is done by the tenant is done under the lease. The Plaintiffs in in making this sough were doing a work necessary for the convenient getting of the minerals on our land as well as those at the *Oak Colliery*, and when the Plaintiffs made it they had only a term in the *Oak Colliery* shorter than their term in ours. That they should acquire a more extended interest in that colliery could not have been in the contemplation of the parties, and the

(1) 4 Ad. & E. 369, 382.
(2) 19 C. B. (N.S.) 732, 743, 753.
(3) 3 Ex. 748, 777.
(4) 6 M. & W. 795, 806.

C. A. 1886

CHAMBER COLLIERY COMPANY v. HOPWOOD.

permission, assuming that it was irrevocable and gave a permanent right, cannot be properly held to give a perpetual right, but only a right co-extensive with the lease from us. The sough was either made under the lease or under the understanding of both parties that it was authorized by the lease.

[They were stopped by the Court.]

COTTON, L.J.:—

This is an appeal from the Vice-Chancellor of the County Palatine, and the main question involved in it is whether the Defendants had a right to deprive the Plaintiffs of the use of an artificial subterranean watercourse which had been made through a considerable part of the Defendants' land, and by means of which for more than twenty years a stream called the *Southern Stream* was diverted from its course, and carried through a continuation made on land not belonging to the Defendants, into a lodge for some works of the Plaintiffs which were at a lower level than the mines demised by the Defendants to the Plaintiffs.

Now we have to consider whether, although there has been enjoyment by the Plaintiffs for a period beyond the twenty years, it was such enjoyment as would entitle them under the Act to claim a right as against the Defendants. We must consider whether it was by permission or not, whether it was precarious or not, for if the enjoyment was by permission or precarious there can be no right under the statute. We must look, as the cases lay down, to all the circumstances under which the use or enjoyment has taken place.

In 1834 the Defendants demised to the Plaintiffs for a term of fifty years all the coals under an estate belonging to the Defendants, which, not only as regards the surface but as regards the strata of coal, is on the rise of the *Oak Colliery*, which is the colliery in respect of which the complaint is made by the Plaintiffs, and down to a lodge in which the water coming by this artificial watercourse was carried, and used for the purpose of the *Oak Colliery*. That demise undoubtedly did not include the surface, but besides the demise of the minerals there were of necessity certain rights granted to the mining tenant over the surface, and the lease clearly shews that it was intended that

the lessees should work the minerals demised not only from pits to be sunk on the land under which the demised minerals were, but from pits sunk on other land not belonging to the Defendants; and there was a clause relating to what might be done with reference not only to engines on the land the minerals under which were demised, but on other lands, which has given rise to a great contention. I do not intend to give any opinion upon the true construction of these provisions. The Vice-Chancellor has held that the lease authorized the making in 1846 or 1847 of this underground drain by which the stream of water was diverted and ultimately got down to the lodge on the Plaintiffs' *Oak Colliery*. That colliery was demised to the Plaintiffs in 1836 for a term of thirty-five years which would expire during the continuance of the lease granted by the Defendants to the Plaintiffs of the coal in the *Chamber Hall* estate. I should say that the lease of 1834 contemplated there being a strong probability that there would be shafts and pits sunk in lands lying on the deep of the demised mines, through which those demised mines could be worked by the same lessees more effectually and more economically than they could be worked if they were all worked through the pits on the rise of the estate. The lease authorized the lessees "to make and sink pits, eyes, drive soughs, tunnels, trenches, roads, railways, and erect fire and other engines, cottages, smithies, huts, hovels, cabins, wheels, pumps, and other devices, and to collect water and make drains, reservoirs, and sluices for the supplying of such engines and machines with water, and also to get stone, clay, sand, &c., for the better and more effectual draining and laying dry, working, banking, and vending the same mines, veins, and beds of coal and cannel in or under any other lands or grounds belonging to any other person or persons whomsoever of which the said parties hereto of the fourth part, or any of them, alone or conjointly with any other person or persons whomsoever, now are, or is, or may during the term hereby demised become the lessees or proprietors." Then there is a somewhat remarkable clause at the end, that engine coal may be allowed not only for engines erected over the demised mines, but for engines working those mines which may be erected on property of other persons. The Vice-Chancellor held

C. A. 1886 CHAMBER COLLIERY COMPANY v. HOPWOOD. Cotton, L.J.

that the first power which I have read authorized the lessees to make this underground drain as being a "sough"; but, as I said, I do not think it necessary to decide that question.

During the continuance of this lease, while the lessees were in possession of the mines, were working them, and were enjoying and exercising certain rights over the surface, they made this artificial drain, which may fairly be called a sough, whether that is the proper meaning of the word "sough" in this lease or not. The agent of the lessors saw them doing this, and approved of it. It is urged that his approval was expressed in words to the following effect: "Oh! this will drain this piece of land, that will help us very much, I am very glad you are doing it;" and this it was contended shewed that he did not consider it to be done under the powers of the lease, but looked upon it as something done by the lessee without any authority under the lease, but which was so beneficial to the land that he would allow it, and that then there would be an easement created in favour of the lessees. I do not think that is the true construction of what passed. The evidence clearly shews that the agent knew what was being done, it clearly shews that he did not raise any objection, and that during the continuance of the lease the water flowed through that artificial drain, and at the time when it was being made it must be taken to have been known that the water would be conducted down to the *Oak Colliery*, which at that time was held by the Plaintiffs for a term which would expire before the term under the lease granted by the Defendants to the Plaintiffs, and the use of the drain was enjoyed during the whole of that lease. Now, in my opinion, considering how improbable it is (there being no evidence of any actual application for permission to make this drain) that the agent of the owner of the soil would permit the lessees to do this work without objection unless he thought they had some right to do it, I am satisfied that the lessees assumed, and that the lessors acquiesced in that assumption, even if it was wrong, that the lease gave the lessors the right during its continuance to make and enjoy this drain for the purpose of conveying water to engines on other property of which they had a lease for a period which would end before the termination of the lease

from the Defendants to the Plaintiffs. As a matter of fact, I cannot come to any other conclusion than that during the continuance of the lease this enjoyment was an enjoyment under a right assumed to be granted by the lease, that is, by permission, and not under a claim to exercise that right adversely to the owner of the soil. In my opinion, therefore, although there has been this enjoyment during the continuance of the lease, that is to say during a period far exceeding the twenty years, it cannot be said to have been an enjoyment as of right, but an enjoyment under an assumption by the lessees that the lease authorized what they did and under an acquiescence by the lessors in that view, and therefore it can give no greater right than there would be if in fact it had been authorized by the lease.

It was pressed upon us very much that the lessors must have known that the drain was made with a view to the water being taken to the adjoining colliery. No doubt they did; but if they considered that the right to make it was granted by the lease, they would conclude that it would come to an end at the end of the lease, and though it might have been unwise for the lessees of the *Oak Colliery* to construct the works they did on that colliery, which was only held on a lease for thirty-five years, the fact that they subsequently, in 1872, acquired a larger interest, cannot prevent the owner of the *Chamber Hall* estate from insisting, at the end of the lease granted by him, that what they did was under an assumption that the lease granted them a right, and under an acquiescence by him in that assumption, or prevent him at the end of the lease from putting an end to the right which was only in the consideration of both parties an incident to the position of the lessors and lessees. In my opinion, therefore, the appeal fails.

BOWEN, L.J.:—

In this case we have to decide a question of fact—whether there has been for twenty years an enjoyment as of right of the use of the sough within the meaning of the *Prescription Act*.

First of all what is the right claimed? It is a right of a peculiar kind—to enjoy an artificial watercourse. When we deal with artificial watercourses we have to exercise care in drawing

C. A. 1886 CHAMBER COLLIERY COMPANY v. HOPWOOD. Bowen, L.J.

the inference of fact owing to the nature of the subject-matter. There may be two kinds of rights claimed; first of all a man may claim a right to continue the enjoyment upon his land of the discharge on to his land of an artificial flow of water from a watercourse made by somebody else above. That is a very difficult kind of right to establish. The mere discharge of water by an upper proprietor upon the land of a lower, may easily establish a right on the part of the upper proprietor to go on discharging, because so long as the discharge continues there is submission on the part of the lower proprietor to proceedings which indicate a claim of right on the part of the proprietor above, but it is difficult for the lower proprietor to establish a right to have the flow continued, just as it would be very difficult to make out that because for twenty years my pump has dripped on to a neighbour's ground, therefore he has a right at the end of twenty years to say that my pump must go on leaking.

The claim that is being made in the present case is not exactly that. It seems to me to be really a claim to conduct a watercourse across another man's land on to your own. It is accompanied with a claim of some right in this watercourse which was made by the Defendants. Has there been enjoyment of such a right as of right for twenty years? That is a pure inference of fact to be drawn from all the circumstances of the case. The law is explained in *Wood* v. *Waud* (1), which has been followed ever since both by the Courts of Common Law and by the Court of Chancery. The inference of fact must be drawn from all the circumstances of the case. We must look carefully at the relation of the parties between whom this sort of enjoyment has been had, and when you get a landlord on the upper part and a tenant below, you must bear in mind that the case is one in which enjoyment may easily be accounted for without there having been any claim of right during any part of the period. Also you must look very carefully at the character of the watercourse, especially if there is a lease existing between the parties, with a view of seeing whether it was intended that that watercourse should last for all time, or whether it was a temporary convenience, the construction of which is perfectly consistent with the notion that it was to be

(1) 3 Ex. 748.

enjoyed only so long as the parties continued their relation of landlord and tenant.

I have come to the conclusion, for the same reasons as Lord Justice *Cotton* has given at length, and which I will not repeat, that either the enjoyment of this artificial watercourse was under the lease (I do not say that it was), in which case there would be no adverse enjoyment as of right, but a mere enjoyment by virtue of rights created by the lease itself,—or if not an enjoyment under the lease it may have been an enjoyment which took place under a belief by both parties that it was under the lease, and if so it would be an enjoyment intended by the parties to operate only during that lease,—or else if it was neither of those two kinds of enjoyment, it was an enjoyment under that sort of friendly comity which prevails between persons who have business relations existing between them, the friendly comity existing between a landlord and a tenant when for the mutual convenience of both parties the landlord does not insist upon his strict right, but the tenant never supposes for a moment that he is gaining any adverse right as against the landlord merely because the landlord is indulgent.

In none of the three alternatives I have mentioned is there any enjoyment as of right, and I am convinced in the present case that the enjoyment falls within one or other of the classes that I have mentioned.

FRY, L.J.:—

I am entirely of the same opinion. In my view, looking at all the circumstances of this case, the enjoyment of this watercourse was either by virtue of the lease, or under colour of the lease, and certainly not under any claim of right independent of the lease.

I think therefore the Vice-Chancellor was quite right, and that this appeal must be dismissed with costs.

Solicitors for Plaintiffs: *Clarke, Woodcock, & Ryland*, for *Tweedale, Sons, & Lees, Oldham.*

Solicitors for Defendants: *Gregory, Rowcliffes, & Co.*, for *Peace & Ellis, Wigan.*

H. C. J.

C. A.
1885
V.-C. B.
*Dec.* 3.
C. A.
1886
*April* 15, 16.

## TAYLOR *v.* BLAKELOCK.

[1885. T. 354.]

*Trustee—Breach of Trust—Fraud of one Trustee—Following Trust Fund—Innocent Trustee — Transferee of Stock — Purchaser for Value without Notice.*

*C.*, trustee with the Plaintiff of a will, and also trustee with the Defendant of a settlement, having misappropriated a portion of the settlement fund, applied an equal portion of the will fund in the purchase of stock, which he transferred into the names of himself and the Defendant. The Plaintiff and Defendant were both innocent of *C.*'s fraud, and the Defendant and the *cestuis que trust* under the settlement had no notice that the stock was purchased with part of the will fund. *C.* died insolvent. In an action by the Plaintiff to compel the Defendant to transfer the stock to him:—

*Held*, by the Court of Appeal (affirming the judgment of *Bacon*, V.C.), that the Defendant having by accepting the transfer of the stock given up his right to sue *C.* for his debt to the trust, was entitled to be treated as a purchaser for value without notice, and consequently to retain the stock as part of the settlement fund.

*WILLIAM LYTE GYHON* died on the 16th of October, 1872, having by his will appointed the Plaintiff *Charles Thomas Taylor*, a solicitor's clerk, and *Robert Carter*, a member of the firm of *Norris, Allens & Carter*, solicitors, his executors and trustees, the Plaintiff being also an annuitant and a residuary legatee under the will. The executors and trustees having duly proved the will, sold the testator's real and personal estate under the trusts of the will, the real estate consisting of a house in *New Bond Street, London*, which was sold by private contract for £6700.

On the 27th of February, 1878, *Carter*, who took upon himself the principal control and management of the testator's estate, invested £5000, part of the proceeds of the house, in the purchase in his own name of £4848 9*s.* 8*d.*, *Metropolitan* 3½ per cent. stock, and he or his firm, who acted as solicitors to the estate, received the dividends in respect thereof, and for some time paid or purported to pay them to the persons beneficially entitled thereto under the will. The Plaintiff stated that he first heard of this investment from a letter written to him by Messrs. *Norris, Allens & Carter* on the 16th of April, 1878.

*Carter* was also trustee with the Defendant, the Rev. *Ralph Blakelock*, of the marriage settlement, dated the 15th of April, 1857, of Mr. and Mrs. *Pearson*, Messrs. *Norris, Allens & Carter* being the solicitors to this trust also. In 1878 *Carter* received two sums, amounting together to £1187 10*s.*, which had become subject to the settlement, and, unknown either to his co-trustee, the Defendant *Blacklock*, or to Mr. and Mrs. *Pearson*, applied them to his own use. Some correspondence having passed between *Carter*, the Defendant *Blacklock*, and the *Pearsons*, as to the best mode of investing the trust money he had received, it was arranged that it should be invested, pursuant to the trusts of the settlement, in *Caledonian Railway Company* 4 per cent. debenture stock. On the 6th of February, 1879, Mr. *Mieville*, a stockbroker ordinarily employed by *Carter's* firm, pursuant to instructions given to him by *Carter* in the name of his firm purchased, as the broker's note stated, "by order and for account of" the firm, £1143 *Caledonian* stock at the price of £1187 9*s.* 6*d.*, the purchase being made for the purpose of effecting the investment of the £1187 10*s.* which *Carter* had received. Five days afterwards, on the 11th of February, *Mieville*, on *Carter's* instructions, sold £3755 4*s.* 4*d.*, part of the *Metropolitan* stock, and on the 13th of February applied £1187 9*s.* 6*d.*, part of the proceeds, in payment for the *Caledonian* stock, which, on *Carter's* instructions, he caused to be transferred into the joint names of *Carter* and the Defendant.

It appeared from the correspondence that the *Metropolitan* stock was sold entirely without the Plaintiff's knowledge; that in October, 1879, *Carter* wrote to him inclosing a cheque which he, *Carter*, said was for the balance of interest due that month on the *Metropolitan* stock, *Carter* at the same time suggesting that the stock should be re-invested on mortgage; and that the Plaintiff, in his reply on the following day, assented to the suggestion. On the 6th of November, *Carter* wrote to the Plaintiff informing him, for the first time, that he had sold the *Metropolitan* stock, and that the proceeds were about to be invested on mortgage. On the 7th of January, 1880, the Plaintiff wrote to *Carter* for particulars of the investment, to which *Carter* replied that he was unable to give any particulars of the mortgage, as

C. A. 1886 TAYLOR v. BLAKELOCK.

the enfranchisement of a portion of the property to be included in the security had not yet been completed.

On the Plaintiff subsequently calling upon *Carter* at his office to make inquiries about the mortgage, *Carter* gave him a memorandum dated the 8th of October, 1879, and purporting to charge certain real estate as security to the Plaintiff, as trustee of *Gyhon's* will, for the sum of £6457 8*s.* 8*d.* therein stated as "forming the trust funds subject to the trusts of the said will." It was said that this security was the subject of litigation at the instance of bankers from whom *Carter* had borrowed money, and that it was in fact an insufficient security for what was due from *Carter* to *Gyhon's* estate.

In September, 1884, *Carter* died insolvent, whereupon the Defendant, as surviving trustee of the *Pearson* settlement, had the £1143 *Caledonian* stock registered in his sole name. The Plaintiff, however, maintained that the stock belonged to *Gyhon's* estate, and brought this action claiming a declaration that he was entitled to have the stock transferred to him, an order on the Defendant to transfer, and an injunction.

In his defence the Defendant insisted that upon the death of *Carter* the stock became his, the Defendant's, sole property as survivor in the joint account between himself and *Carter*, and charged the Plaintiff with gross and culpable negligence in allowing *Carter* to have sole control over the said *Metropolitan* stock.

The Plaintiff then joined issue.

Both the Plaintiff and the Defendant were examined by interrogatories. In his answer the Plaintiff said he entrusted the management of the change of investment from the *Metropolitan* stock to *Carter*, and that he was never truly informed how it was made: and that *Carter* had entirely misled and deceived him in the transaction. The Defendant in his answer stated that he left the completion of the investment in *Caledonian* stock entirely to *Carter*, and that he always believed that the stock had been purchased with the funds received by *Carter* from the *Pearson* settlement.

The action came on for trial before Vice-Chancellor *Bacon* on the 3rd of December, 1885.

The main facts of the case not being in dispute, they were made the subject of admissions in writing agreed upon between the parties.

The only question for decision was one of law, whether, under the circumstances and having regard to the rules of equity, the Plaintiff was entitled to follow his trust fund into the hands of the Defendant.

*Hemming*, Q.C., and *Chester*, for the Plaintiff:—

The Defendant having, though himself innocent of the fraud, acquired the fund in his possession through the fraud of a third person cannot be allowed to retain it; for he takes it "tainted and infected" with the fraud: *Huguenin* v. *Baseley* (1); *White* and *Tudor's* Leading Cases in Equity (2).

The property in its original state and form having been covered with a trust, no change in that form can divest it of such trust: per Lord *Ellenborough* in *Taylor* v. *Plumer* (3); *Lewin* on Trusts (4). Whether trust property has been rightfully or wrongfully disposed of, the proceeds may be followed if they can be identified, as they can here: *In re Hallett's Estate* (5). *Carter* having been solicitor to our trust estate, we are entitled to a lien on the property fraudulently purchased by him with our money: *Hopper* v. *Conyers* (6).

*Marten*, Q.C., and *Hadley*, for the Defendant:—

In similar cases it has been held that a fund transferred from one settlement to make good a breach of trust in another cannot be followed, the transfer being equivalent to an alienation for value without notice: *Thorndike* v. *Hunt* (7); *Case* v. *James* (8). Here the Defendant was purchaser for valuable consideration without notice, the transfer of the *Caledonian* stock having been executed to himself and *Carter* in the ordinary way. The Plaintiff must suffer the consequences of his own negligence in allowing his co-trustee, *Carter*, to have the sole control of the *Metropolitan*

(1) 14 Ves. 273, 289.
(2) 5th Ed. vol. ii., pp. 547, 586.
(3) 3 M. & S. 562, 574.
(4) 7th Ed. p. 762.
(5) 13 Ch. D. 696.
(6) Law Rep. 2 Eq. 549.
(7) 3 De G. & J. 563.
(8) 29 Beav. 512; 3 D. F. & J. 256.

C. A. 1886 TAYLOR v. BLAKELOCK.

stock and not making any inquiry as to what his co-trustee was doing.

*Hemming*, in reply:—

The defence for purchase for value without notice is not set up in the pleadings: and even if it had been, the Defendant was not a purchaser for value at all. *Thorndike* v. *Hunt* (1) is distinguishable on two grounds: first, the fund stolen by the fraudulent trustee from his other trust was brought into Court in the suit in which that fund was administered, whereas here the fund was not brought into Court. Secondly, there was a consideration for the payment in the threat of process against the fraudulent trustee. Here there was no consideration, for there was no pressure upon or threat of process against the fraudulent trustee, neither the Defendant nor the *Pearsons* having any knowledge of the fraud.

BACON, V.C.:—

This case is one of considerable nicety, no doubt, and it is one of those painful cases in which, as between two innocent persons, a loss having been sustained, the Court is to decide upon whom that loss should fall.

[His Lordship first dealt with the objection that there was no plea by the Defendant of purchase for valuable consideration, saying that he could not entertain the objection, the just inference from the facts admitted by the parties being that the Defendant was a purchaser for valuable consideration without notice. His Lordship then proceeded to state the facts of the case, pointing out that the Plaintiff was aware in November, 1879, that the *Metropolitan* stock had been sold; and continued:—]

From that time until *Carter's* death, when the present dispute arose, no step whatever was taken by the Plaintiff either to complain of the sale of the stock, or to inquire what had been done with the proceeds of it: and it is not until he files his statement of claim in this action that he alleges anything incorrect had been done on the subject.

Now what took place on the part of the Defendant? The Defendant, it is admitted, had a claim against Mr. *Carter* for two

(1) 3 De G. & J. 563.

sums amounting to £1187 10*s.* The mode in which the claim arose and the manner in which it was met by Mr. *Carter* are clearly in evidence. The Defendant having approved of the purchase of the *Caledonian* stock, Mr. *Carter*, fraudulently no doubt, applies part of the proceeds of the *Metropolitan* stock for the purpose of purchasing the *Caledonian* stock. The purchase is made by the two trustees of the *Pearson* settlement, Mr. *Carter* and the Defendant, and their position as trustees of the stock is completed by the transfer of the stock to them.

No doubt, on many occasions when the Court has been able to trace the application of trust funds, and is satisfied that the application was fraudulent and unjust, it has followed the trust funds, whatever shape they may have assumed after the misapplication.

Now has that any sort of application to the case before me? Certainly not. The £1187 10*s.* in its first appearance forms a debt due from Mr. *Carter* to the trustees of the *Pearson* settlement. His co-trustee and the beneficiaries demand the payment. Their demand is complied with—by fraud, it is said, and no doubt very truly said—but by a fraud of which they had no notice. Not only has the Defendant pleaded, in substance, that they had no notice, but it is proved by the evidence, the correspondence, and the admissions taken together, that they could have had no such notice. The manner in which the purchase was made is fully detailed: the correspondence shews the very steps of it; and the result is that Mr. *Carter* procures for the trustees the *Caledonian* stock with no mention or notice of any other interest in it, and that it is vested in the two trustees, the transaction being thus complete.

By the death of Mr. *Carter* the legal estate in the *Caledonian* stock becomes vested in the Defendant. What the Plaintiff has to do is to shew me that by some doctrine of the Court of Equity, or by some facts in the case, he has a right to take away from the Defendant that which the Defendant has acquired in the manner I have described. The *Metropolitan* stock having been sold, and the proceeds put into the hands and possession of Mr. *Carter* without objection on the part of the Plaintiff, to be invested on mortgage, the Plaintiff says that because Mr. *Carter* did not

C. A. 1886 TAYLOR v. BLAKELOCK. V.-C. B.

invest the money on that mortgage, he, the Plaintiff, has the right to take it away from the Defendant who has so acquired it.

I take *Thorndike* v. *Hunt* (1) to be a distinct authority for all that is contended for on behalf of the Defendant. If the chain of representation of a trust fund can be shewn to have been preserved, then the trust will be effectual, and whatever misapplication has taken place can be rectified by the judgment of the Court. But, on the other hand, where a trustee, however unjustly and improperly as regards his own actions, deals with a trust fund, and parts with it to another person, justly as between those two actors in the transaction, and without notice to that other person of any want of title or any infirmity of right on the part of the trustee—when he transfers the trust fund in the regular formal manner to that other person without notice, no instance can be referred to in which the Court has ever said that the property so acquired upon such a transaction between debtor and creditor without notice can be interfered with on the ground that the debtor had misapplied money in his hands as trustee.

I rely wholly on *Thorndike* v. *Hunt* as containing a distinct authority for the judgment which I feel obliged to pronounce in this case. I find that both the Judges in that case allude to the circumstance of the party being a purchaser for valuable consideration without notice. I find no circumstance of suspicion or doubt of any kind in any part of the transaction which would induce me to believe that the Defendant dealt on this occasion with notice of anybody else's claim but Mr. *Carter's*, and I can find no ground whatever upon which I can impute any negligence or omission to the Defendant.

On the part of the Plaintiff the omission and negligence are, in my opinion, flagrant. The trustee entitled to—or interested in, if not entitled to—the *Metropolitan* stock, knows that his co-trustee has sold that stock, turned it into money, and means to invest it upon a mortgage. What, after that, can he say if it is found that his co-trustee committed any breach of trust, or dealt with the stock in any way? What right has he to say that what has been done shall be undone? In my opinion the Plaintiff has, on the principle I have adverted to, and having regard to the

(1) 3 De G. & J. 563.

admitted facts, and the plain evidence furnished by the correspondence, wholly failed to attach to the Defendant any liability to transfer back to him this *Caledonian* stock which, so far as regards any knowledge of the Defendant, never was money subject to or impressed with any trust other than the trusts of the settlement; but which was money within the control of Mr. *Carter* with the full assent of the Plaintiff, and was, as between those two, money subject to a joint obligation which the Plaintiff might have enforced.

C. A. 1886 TAYLOR v. BLAKELOCK. V.-C. B.

I think, therefore, the claim fails, and I dismiss the action with costs.

G. I. F. C.

From this decision the Plaintiff appealed, and the appeal came on for hearing on the 15th of April, 1886.

C. A.

*Hemming*, Q.C., and *Chester*, in support of the appeal, addressed the same arguments to the Court as they had made use of in the Court below, and in addition contended that even if the Defendant could be treated as a purchaser for value, the subject-matter of the purchase was a *chose in action*, and must be held by him subject to the equities which affected it at the time of the purchase: *Athenæum Life Assurance Society* v. *Pooley* (1).

*Marten*, Q.C., and *Hadley*, for the Defendant, were not called upon.

COTTON, L.J. (after stating the facts of the case, continued):—

It is said that this *Caledonian* railway stock, the transfer of which the Plaintiff seeks to obtain, is a *chose in action*, and that any one who takes an assignment of a *chose in action* takes it subject to all existing equities. But that rule applies only to a *chose in action* not transferable at law; that is not the rule as regards the right to sue on a bill of exchange or promissory note. I do not at all say whether this is a *chose in action* within the meaning of that rule. It certainly is not one to which the rule applies, because here *Blakelock* has the legal right to this debenture stock, and he is the only person who has that legal right.

(1) 3 De G. & J. 294.

C. A. 1886 TAYLOR v. BLAKELOCK. Cotton, L.J.

I need not talk of legal estate, but the legal right to the *chose in action*, if it be a *chose in action*, which is at law transferable, and has been transferred to him.

Now on what ground does the Plaintiff seek to get it back from him? He says "this was purchased with or was my trust fund, and as I have identified it I have a right to follow it." But can he do so in this case? If the Defendant held it simply as a transferee without any consideration, of course he would stand in no better position than the transferor; that is to say, as the fund in the hands of *Carter* would have been subject to the trusts of the *Gyhon* will, anyone who took it from him simply as a volunteer could not say that he had any better title, and would still be bound by the trusts of the *Gyhon* will. But is that the position here of the Defendant? At the time when this transfer was made to him, when this fund got into his name, he had a right to sue his co-trustee for the purpose of getting that money, which had got into his hands or into the hands of his firm; either way *Carter* would have been liable. When he took the transfer of this stock into the name of himself and of *Carter* he, by accepting the transfer, lost and put an end to the right of action which he had as against *Carter* in order to make him bring back this fund, and invest it for the purposes of the *Pearson* settlement. Therefore he gave up by accepting this stock a valuable right. He gave valuable consideration just as much as if he had actually parted with money; for he gave up, lost, parted with the right to sue *Carter*, which up to the time when this stock was transferred he had. In my opinion, independently of any question of pressure, that was valuable consideration, and prevents it being alleged on the part of the Plaintiff, or those *cestuis que trust* whom he represents, that *Blakelock* holds this debenture stock in the same position as *Carter* did. It is not suggested for one moment that he had any notice of the breach of trust committed by *Carter*. He had no notice at all of the fact, but simply took from *Carter*, without any notice at all of any breach of trust committed by him, the sum of money which purchased this stock transferred into their joint names. In my opinion the judgment of the Vice-Chancellor was quite right.

I think I need not enter into the cases that have been referred to; *Case* v. *James* (1) was really entirely different. It does not in any way question *Thorndike* v. *Hunt* (2), but it goes only on this ground, that the Plaintiff himself had concurred in the breach of trust which put the stock into the name of *Tritton*, and the Court refused at his instance to grant any relief, leaving open the question whether the *cestuis que trust* would have any relief, not at all saying they would, but only saying that is a question which is not before us. As I have pointed out, if they had brought the action, the case would have been very different from the present, because *Tritton* was a trustee with *Case* for the parties whom *Case* represented in the action, and he was the sole trustee of the other trust. Here *Blakelock* is simply a trustee for the *Pearson* family, and not in any way for the *Gyhon* trust. *Thorndike* v. *Hunt*, it was admitted, was an authority in favour of this case, except that the facts there are different, in some respects more strongly against the claim than those which exist in the present case, in other respects not quite so strong. There was pressure there, but in my opinion to make valuable consideration, and prevent *Blakelock* being considered as a mere volunteer when he took the transfer of the stock, it was not necessary that there should be any pressure by him on *Carter*. Quite enough that by accepting this transfer he lost and gave up the right of action against *Carter* which he then had in respect of the debt due from *Carter*.

BOWEN, L.J.:—

I am of the same opinion. *Blakelock* has got a legal right to this property, and why on earth is it to be taken away from him? It can only be taken away from him on the ground of some breach of trust which affects it. No doubt if he had notice, then his legal title would disappear, would be invalidated. If he was a volunteer he could not stand in a better position than the person who conveyed to him; but if he is not a volunteer, upon what principle can you take away his property?

That really reduces it to the simple question of what is the meaning of the term "a purchaser for value" in such cases. "A

(1) 29 Beav. 512; 3 D. F. & J. 256. (2) 3 De G. & J. 563.

C. A. 1886 TAYLOR v. BLAKELOCK. Bowen, L.J.

purchaser for value" is a well-known expression to the law. By the common law of this country the payment of an existing debt is a payment for valuable consideration. That was always the common law before the reign of Queen *Elizabeth* as well as since. Commercial transactions are based upon that very idea. It is one of the elementary legal principles, as it seems to me, which belong to every civilised country; and many of the commercial instruments which the law recognises have no other consideration whatever than a pre-existing debt.

The man who has a debt due to him, when he is paid the debt has converted the right to be paid, into actual possession of the money; he cannot have both the right to be paid and the possession of the money. In taking payment he relinquishes the right for the fruition of the right. In such a case the transaction is completed; and to invalidate that transaction would be to lull creditors into a false security, and to unsettle business.

FRY, L.J.:—

I entirely concur in both the reasons and conclusions of my learned Brethren.

The appeal was dismissed with costs.

Solicitors for Appellant: *J. J. & C. J. Allen.*

Solicitors for Respondent: *Blake & Heseltine,* agents for *J. Wilkinson, North Walsham.*

W. W. K.

## BLAKE *v.* GALE.

C. A. 1886 April 17, 19, 20.

[1885 B. 1333.]

*Following Assets—Claim by Mortgagee against Residuary Legatees—Acquiescence—Lapse of Time.*

The right of mortgagees of real estate whose security proves insufficient, to come against the residuary legatees of the mortgagor, amongst whom his personal estate has been distributed, is a purely equitable right, and the Court will not enforce it if there are circumstances which would make it inequitable to do so.

A testator devised his freehold farm to two of his sons upon trusts for his children and issue, and directed that his unmarried daughters should be at liberty to carry on his farming business upon it, paying a rent of £600. He gave his residuary personal estate, in the events which happened, equally among his six children, the above two sons (who were executors as well as trustees) and his four daughters. The testator had made a first mortgage for £12,000, and a second mortgage for £2400, and his personal estate was under £11,000. Shortly after the death of the testator in 1859, the solicitors of the mortgagees made inquiry as to his affairs, and the solicitor of the trustees informed them of the state of the assets, and stated that the two unmarried daughters would probably carry on the farm for a time, and that their shares of the personal estate would no doubt afford them sufficient means to do so. The solicitors of the mortgagees wrote back to say that they should be glad to hear that the daughters were able to continue at the farm. The two daughters carried on the farm till 1863, when one of them married, and the farm was then let by the trustees to her husband. The interest was duly paid till 1880, when, owing to agricultural depression, the security proved insufficient. The mortgagee for £2400 in 1882 commenced an action to enforce his security, and to prove for the deficiency against the mortgaged estate, seeking to charge the executors with a *devastavit* in distributing the personalty without providing for his mortgage debt. *Bacon*, V.-C., held the executors not guilty of *devastavit*, they were charged with their own shares of the residuary personalty as assets in hand, and the balance found due from them was applied in payment of the mortgage debt, without prejudice to any proceeding to make the other residuary legatees refund. The Plaintiff then brought this action against the four daughters to recover the shares of personalty which they had received:—

*Held* (affirming the decision of *Bacon*, V.-C.), that the Plaintiff could not recover, for that the mortgagees having assented to the distribution of the personal estate among the residuary legatees, could not, after this lapse of time, claim it back from them.

ON the 30th of August, 1843, *William Gale* mortgaged to *Keith* and *Blake* for £2400 advanced by them on a joint account,

C. A. 1886 BLAKE v. GALE.

the equity of redemption of a farm called *North Fambridge*, belonging to him and in his own occupation, on which he had given a prior mortgage for £12,000. *Gale* died on the 9th of July, 1859, leaving a will by which he devised the farm to trustees (his two sons and his brother-in-law) upon trust to allow such of his daughters as might be unmarried to carry on the farming business, they keeping down the interest on the mortgages, repairing, insuring, &c., and in certain events upon trust to sell the farm and divide the proceeds among such of his children as should be living at the time of distribution, and the issue of such of them as should be then dead, the issue taking their parents' shares. He gave his residuary personal estate equally among his children living at his decease, and the issue of such of them as should be then dead, the issue taking their parents' shares, with a proviso for bringing into hotchpot sums already advanced to some of his children. The trustees were appointed executors. By a codicil he directed that the farm should not be sold until after the decease of all his children, that the daughters while occupying the farm should pay a rent of £600, and that in the event of the marriage of all his daughters or their declining to carry on the farm, his trustees should let it, pay the interest on the mortgages, and divide the surplus among his children equally, the issue of deceased children taking their parents' shares.

On the 26th of August, 1859, Messrs. *Keith, Blake & Keith*, the solicitors of both sets of mortgagees, wrote to one of the testator's sons, asking as to the nature of the dispositions made by Mr. *Gale's* will, stating that the mortgage moneys were considerable, and that the mortgagees felt some interest in knowing whether the farm was to be carried on, and to whom they must apply for interest. On the 1st of September, 1859, the solicitor of the *Gale* family wrote a letter to Messrs. *Keith, Blake & Co.*, stating the effect of the will and codicil, and the state of the family—two sons, two married daughters, and two unmarried daughters. He then went on to say: "Whether the unmarried daughters will avail themselves of the power given them to carry on the farm is not finally decided, though it is most likely they will try it for a year or so, it having been their father's wish that they should

remain at *North Fambridge*, and his belief that it would be to their advantage to do so. The valuation of the personalty for the legacy office has but just been completed, it amounts to between £10,000 and £11,000, and the shares of the two unmarried daughters of that sum, and of the sums already advanced to other members of the family, will afford them, there is no doubt, sufficient means to carry on the business should they determine to do so. In any case you will observe the executors, who are also trustees of the will, will be the persons to whom your clients will have to look for payment of the interest, and there is no reason to expect that that will be paid with less punctuality, or the business carried on less effectively, than it was by the late Mr. *Gale*. I will take care that you are duly apprised of the decision the young ladies may come to on the subject." On the 3rd of September, *Keith, Blake & Keith* replied: "We are much obliged to you for your long and explanatory letter regarding our late friend Mr. *Gale's* affairs. We shall be very glad to hear that his daughters are able to continue at *North Fambridge* with comfort as well as advantage to themselves." The residuary personal estate was shortly afterwards distributed among the testator's children. The two unmarried daughters determined to occupy the farm, and they carried on the business till 1863, when one of them married a Mr. *George Gale*. The daughters then gave up the farm, and it was let by the trustees to *George Gale*. The interest on the mortgages was paid by the unmarried daughters till 1863, and afterwards by *George Gale*, who deducted it from the rent which he paid to the trustees.

In 1880, owing to the prevailing agricultural depression, *George Gale* became unable to pay the interest, and in March, 1882, the representative of the survivor of the mortgagees for £2400 commenced an action on behalf of himself and the unsatisfied creditors of the testator, alleging that *Gale's* executors had been guilty of a *devastavit* in distributing the testator's personal estate without providing for the mortgage debts, and asking that an account might be taken of what was due on the £2400 mortgage, that in default of payment the mortgaged premises might be sold, and that if they were insufficient to pay the amount

C. A. 1886 BLAKE v. GALE.

then that the executors might be ordered personally to make up the deficiency. Vice-Chancellor *Bacon* held that the remedy for *devastavit* was barred by the *Statute of Limitations*, but made a decree for an account and for administration of *Gale's* estate (1).

In prosecuting this decree, the executors were not allowed the sums which they had retained in respect of their own shares in the residuary personalty, and a balance was therefore found due from them, which they paid into Court. The mortgage for £2400 was found worthless, as the equity of redemption of the farm subject to the £12,000 mortgage could not be sold. An order was made dealing with the fund in Court, without prejudice to any proceedings to make the other residuary legatees refund. The present action was then commenced by the same Plaintiff against the daughters of the testator, and the husbands of those who had husbands living, to make them refund. Vice-Chancellor *Bacon* dismissed the action (2). The Plaintiff appealed.

*Marten*, Q.C., and *Freeman*, for the Appellant:—

We have not appealed against the judgment in the former action, but we say that it does not affect the claim against the beneficiaries. The case is very like *In re Marsden* (3). The evidence does not shew that the Plaintiff knew of or assented to the distribution of the personal estate among the residuary legatees. While interest is duly paid on a mortgage by the persons who represent the debtor, the mortgagee is not bound to inquire from what source the money comes, and the debt is kept alive for all purposes. *Ridgway* v. *Newstead* (4) was relied on against us, but the special circumstances in that case made it very different from the present. We contend that where the same persons are devisees and residuary legatees, the claim against the latter remains as long as the mortgage subsists: *March* v. *Russell* (5).

[FRY, L.J.:—The question of lapse of time seems not to have been raised there.]

*Fordham* v. *Wallis* (6) also supports our view.

(1) 22 Ch. D. 820.
(2) 31 Ch. D. 196.
(3) 26 Ch. D. 783.
(4) 3 D. F. & J. 474.
(5) 3 My. & Cr. 31.
(6) 10 Hare, 217.

*Chinnery* v. *Evans* (1) shews that the payment of interest by persons who are devisees and executors is attributable to both characters, and keeps the claim alive against personalty as well as realty. Six years are not a bar, where the persons paying interest are the persons responsible in both capacities, and so a further time will not bar: *Roddam* v. *Morley* (2).

[FRY, L.J.:—Does any case bear on the question whether the right to follow assets is lost by the lapse of twenty years, or whether it is kept alive by payment of interest.]

We have not found any such case.

[COTTON, L.J.:—Is it shewn that the daughters knew that the interest was being paid?]

The trustees who were the lessors deducted it from the income, so it must be inferred that the daughters knew. They do not deny having known it.

[FRY, L.J.:—If you can prove that accounts were rendered to them in which interest was deducted that will carry you some way, but it cannot be inferred from their receipt of income that they knew what deductions were made from that income. Then you received interest out of the rents, for you must have known that the personal estate had been distributed, and must not the payment then be treated as a payment by the devisees?]

We do not admit this knowledge, and we contend that it is not proved. There has been no such acquiescence as to bar us, and the equitable right exists as long as the legal: *In re Baker* (3); *De Bussche* v. *Alt* (4).

*Hemming*, Q.C., and *B. B. Rogers*, for the Defendants, except the testator's daughter, Mrs. *Westrupp*, whose share had been settled on her marriage, and her husband:—

[COTTON, L.J.:—Does the Appellant prove that you knew of the payment of interest, and do you prove that he knew that the personal estate had been distributed?]

The evidence is not strict, but we think that both questions

(1) 11 H. L. C. 115.
(2) 1 De G. & J. 1.
(3) 20 Ch. D. 230.
(4) 8 Ch. D. 286.

C. A. 1886 BLAKE v. GALE.

must be answered in the affirmative. What took place at the time of the distribution shews that the mortgagees considered their security to be a sufficient one, and assented to the distribution of the personal estate, and they said nothing about retaining a claim against the residuary legatees. No such claim was ever advanced till the recent unexpected agricultural depression made the security insufficient. In *Fordham* v. *Wallis* (1), where the persons who paid interest were devisees in trust of a life interest, and also executors, it was held that the payments were to be attributed under the circumstances to the character of executors, and that the debt was not kept alive against the real estate. That case is the converse of the present, and furnishes a strong analogy in our favour. The right of a mortgagee to follow the personal estate into the hands of the residuary legatees is not a legal right, but a purely equitable one, and the Court will not enforce it under circumstances which make it unjust to do so. Here the mortgagees assented in the most deliberate way to the distribution of the personal estate among the residuary legatees, and for twenty years never said a word about a demand against the personal estate; by such conduct they debarred themselves from recalling it. Even if there were not such an assent, is there to be no bar from lapse of time in such cases? If twenty years from the time of distribution is not to be a bar there can be no bar at all, which would be a monstrous state of the law.

*Begg*, for Mr. and Mrs. *Westrupp*, argued as in the Court below as to the effect of their marriage settlement, but it became unnecessary to decide the point.

April 20. COTTON, L.J.:—

This is an appeal from a judgment of Vice-Chancellor *Bacon* dismissing with costs the action of the Plaintiff.

The case is a remarkable one. The Plaintiff is second mortgagee of a farm, and under a covenant contained in the mortgage deed he is a creditor of the testator. The interest on the mortgage had been paid until shortly before the commencement of these proceedings, and this payment kept alive the mortgage

(1) 10 Hare, 217.

debt as against the mortgaged property. I will not enter into the question whether it kept it alive effectually as against the personal estate. The interest was regularly paid for many years, and only ceased to be paid in 1880, when the security, which up to that time had been considered sufficient, proved to be insufficient. The Plaintiff then brought an action against the executors and trustees of the mortgagor alleging a *devastavit* by the executors in distributing the personal estate without providing for the mortgage debt, seeking to have the mortgaged property sold, and the deficiency, if any, made good by the executors personally to the extent of the personal estate distributed among the residuary legatees. Vice-Chancellor *Bacon* held that the remedy for *devastavit* was barred, but made a decree for sale of the mortgaged property and for administration of the mortgagor's estate. Two of the executors were also two of the residuary legatees, and they of course were to be treated as having in hand their shares of the residue. In that action the Plaintiff recovered from those executors the amount of the shares which they had retained of the residuary personal estate, because it remained in their hands as part of the estate, and now he brings this action to recover from the other four residuary legatees, the daughters of the testator, the amount of their shares of the residuary personal estate.

It was held in the previous action that the executors were not liable as on a *devastavit* for distributing the estate before this debt was paid, on the ground that the claim for *devastavit* was barred by six years, and when that action was commenced it was more than twenty years since the distribution. But the Plaintiff contends that though the personal estate had been divided more than twenty years before the commencement of this action, and though he had lost his right as against the executors, he is entitled to recover from the Defendants what they received out of the residuary personal estate.

The case is in many ways singular, and is one to which there appears to be no parallel in the reported cases. Here is a mortgagee who says: "My interest has been duly paid. I had no ground therefore for commencing any action at an earlier period, and insist on my right as a creditor because my mortgage is insufficient." Then on the other hand we have this startling fact

C. A. 1886 BLAKE v. GALE. Cotton, L.J.

before us, that the legatees have been in possession of their shares of the residue for more than twenty years, and that it had been decided that the executors are not liable for having divided the estate as they did. The Vice-Chancellor held that under those circumstances the mortgagee as creditor had lost his right as against the present Defendants.

The case of *Ridgway* v. *Newstead* (1) was much relied upon before the Vice-Chancellor, and I think he based his judgment upon it. The present case is not at all like *Ridgway* v. *Newstead* in its circumstances; but in my opinion, that case lays down a principle applicable to the present, viz., that as the right of the creditors to follow assets which have been distributed without providing for their debt is a right only in equity, equitable considerations, if sufficiently weighty, will make it the duty of the Court not to grant that equitable relief to which under ordinary circumstances creditors are entitled.

The question here is—are the circumstances sufficient to prevent the Plaintiff from obtaining relief? I do not go into the question of delay, because delay alone (as was said by Lord *Campbell* in *Ridgway* v. *Newstead*) is not sufficient to prevent the creditor from asserting his right. There must be, to produce that effect, changes of position in the legatees during that period, or other circumstances which would make it inequitable to allow him to do so. In this case I do not rely upon alteration in position of the legatees, but what we have to consider in my opinion, is this: How did the mortgagees act as regards the distribution of the estate?

There were two mortgages on this farm, one for £12,000, the other for £2400, and it is the mortgagee for the £2400 who is bringing this action as a creditor.

Very shortly after the death of the testator, who devised this farm with a right to his unmarried daughters to occupy it, the mortgagees very reasonably, being anxious to know how their security will be dealt with, write to the executors, who refer them to their solicitor, Mr. *Griffin*, and on the 1st of September, 1859, a letter was written by Mr. *Griffin* to the mortgagees' solicitors, telling them correctly and shortly what were the provisions of the

(1) 3 D. F. & J. 474.

will. [His Lordship then read the passage from the letter which is set out above.]

That is replied to by a letter of the 3rd of September, by Messrs. *Keith, Blake & Keith*, who were acting not only for the second mortgagees, who are represented by the present Plaintiff, but also for the first mortgagees. What they say is this: "We are much obliged to you for your long and explanatory letter regarding our late friend Mr. *Gale's* affairs. We shall be very glad to hear that his daughters are able to continue at *North Fambridge* with comfort as well as advantage to themselves."

Now, what were Messrs. *Keith* told by Mr. *Griffin's* letter? It expressed a hope that the daughters would occupy and cultivate this farm, and they were told that the personal estate amounted to between £10,000 and £11,000, not enough to pay both these mortgages, and they were also told this, that if the daughters availed themselves of the option and carried on the farm their shares in the residuary estate, *i.e.* of the £11,000, and of the sums which had been advanced to the other members of the family, "will afford them, there is no doubt, sufficient means to carry on the business should they determine to do so." Then what is the answer of the mortgagees? It expresses a hope that the daughters would be able to continue at the farm with comfort and advantage to themselves, their doing which would necessarily involve a division of the estate, so that the daughters might have their shares in order to enable them to carry on the farm. That was really an assent on the part of the mortgagees to the division contemplated, and by the letter of the executors shewn to be contemplated; and it must be remembered that this division would be to some extent for the benefit of the mortgagees, because the carrying on of the farm would prevent the deterioration of their security. There was an assent to the division, and not only an assent to the division, but an assent to the division for the purpose, so far as necessary, of the money being expended in the cultivation of the farm. Though I do not rely upon delay here as barring any right which the mortgagees might have, yet it is not to be disregarded as helping what is, in my opinion, the true construction of those letters. The mortgagees

C. A. 1886 BLAKE v. GALE. Cotton, L.J.

for many years never in any way adverted to their right as against the personal estate, though they knew from the first that the shares of the unmarried daughters were to be expended in carrying on the farm, with a probability that they would be usefully employed in cultivating it, but with a risk of their being wholly lost. In my opinion, this assent to the division prevents the mortgagees from saying that the personal estate is still liable to them. It is an equitable release of the right which they would otherwise have had, to fall back on the personal estate if from any reason and under any circumstances their security became deficient. To allow creditors after such an assent to the distributing of the personal estate, to come after this lapse of time to recover the personal estate from the residuary legatees, would, in my opinion, be wrong, and contrary to what, under the circumstances, is just between the parties. It must be remembered that the right of the creditors to proceed against the residuary legatees is simply a right given by equity in order that justice may be done. It does not depend on any right against the executor, because even if the executor has distributed the assets under the decree of the Court, so that there is no claim against him, still creditors who come within a reasonable time and have not in any way barred themselves retain their right as against the legatees. Here, having regard to the knowledge and the assent of these creditors, in my opinion it would be wrong to give them relief against the legatees.

It is very true that only two of these legatees had been engaged in the cultivation of the farm, but no distribution could be made to them unless there was also a distribution among the other legatees, and although the executors who had retained their own shares were considered as having them in their hands subject to be applied as assets, yet in my opinion, as between the creditors and these four other legatees, that knowledge and assent of the creditors to which I have already referred, as shewn by the letters, bars them in equity from making the claim they now make against those of the residuary legatees who were not executors.

In my opinion the decree was right and the appeal fails.

BOWEN, L.J.:—

I am of the same opinion.

It seems to me quite clear that Mr. *Rogers* was right when he said that this question was an equitable one, and that what we had to decide was whether a Court of Equity under the circumstances of this case would give the mortgagee recourse to parties against whom he has no claim at law. If the question depended simply on the lapse of time during which the mortgagee of the real estate has received payment of interest, difficult questions might arise, which it is not necessary to decide on the present occasion. When we find that a long time has elapsed during which the right has never been insisted upon, and when neither the *Statute of Limitations* applies, nor can the analogy of the statute be invoked according to the well known way in which Courts of Equity occasionally invoke it, what have we to do? We have to look at the delay which has taken place, coupled with the circumstances under which it has taken place, in order to see whether or not the true inference to be drawn from such delay under such circumstances is that the party claiming the right either agreed to abandon or release his right, or else has so acted as to induce the other parties to alter their position on the reasonable faith that he has done so. If that is the inference to be drawn, the claim will, for the purpose of quieting possession, be treated as abandoned.

Now I certainly do not propose to rush in where the Lord Justice *Cotton* has hesitated to tread, or to attempt to lay down any general rule as to what will debar a mortgagee of real estate from following assets into the hands of legatees. Each case must depend on its own circumstances. In this particular case it seems to me that the rights of the parties are to be decided upon the ground that, as I read the facts, the mortgagees at the date of the distribution of the personal estate both knew what was going to be done in respect of the distribution, and assented to it for their own interest. That amounts really to an equitable release or abandonment of their right of recourse against the personal estate, and it seems to me it would be wrong and impossible to allow a mortgagee who has consented to a distribution for his own interest in this way, to come afterwards and say, that

C. A. 1886 BLAKE v. GALE.

notwithstanding the distribution he should be allowed to follow the assets in the hands of the legatees.

FRY, L.J.:—

I entirely agree.

Solicitors for Plaintiff: *Blake & Heseltine,* for *Keith, Blake & Co., Norwich.*

Solicitors for Defendants: *Duffield & Bruty.*

H. C. J.

---

C. A. 1886 *April* 20; *May* 4.

## JENNER-FUST *v.* NEEDHAM.

[1883 J. 1094.]

*Mortgage—Foreclosure—Receipt of Rents by Receiver between Date of Certificate and Day fixed for Redemption.*

Where a receiver has received rents of mortgaged property between the date of the certificate under a foreclosure judgment and the day fixed for redemption the mortgagee is not entitled to the rents so received, except on the terms of bringing them into account as between mortgagee and mortgagor, and a fresh date must be fixed for redemption.

The Court to save the expense and delay of a further reference to Chambers allowed mortgagees to file an affidavit shewing the exact amount which would be due to them for principal, interest, and costs, after allowing for everything received, brought down to the day for which notice of motion was given to fix another day for redemption.

APPEAL by the Plaintiffs from a decision of Mr. Justice *Pearson* (1).

The ordinary foreclosure judgment had been made in the action on the 26th of April, 1884, the time fixed for redemption being six months after the date of the certificate.

The certificate was made on the 2nd of July, 1885, and found that there was then due to the Plaintiffs for principal £10,000, for interest £1004 13*s.* 9*d.*, and for the taxed costs of the action £215 11*s.* 2*d.*, and that there would be due to them on the 2nd of January, 1886, the sum of £193 6*s.* 8*d.* for further interest.

The Defendants did not pay the amount found due from them,

(1) 31 Ch. D. 500.

C. A. 1886 JENNER-FUST v. NEEDHAM.

and the Plaintiffs on the 6th of February moved for an order absolute for foreclosure. The receiver who had been appointed upon the application of the Plaintiffs on the 26th of July, 1883, made an affidavit dated the 29th of January, 1886, stating that he had in his hands £1094, which had arisen from rents of the mortgaged property received by him between the date of the certificate and the 2nd of January, 1886.

The Plaintiffs asked that by the order absolute for foreclosure the receiver might be discharged without passing his accounts, that his recognisances might be vacated, and that he might be ordered to pay the money in his hands to the Plaintiffs.

The motion stood over to allow the mortgagor and the *puisne* mortgagees to be served. The mortgagor did not, however, appear, and on the 13th of February, Mr. Justice *Pearson* made an order directing the receiver to pass his accounts, a fresh account to be taken between the Plaintiffs and Defendants, so as to include the £1094, and giving the Defendants one month from the date of the fresh certificate to redeem.

The Plaintiffs appealed, but no notice of appeal was served on the mortgagor.

The appeal came on for hearing on the 20th of April, 1886.

*Napier Higgins*, Q.C., and *Nalder*, for the Appellants:—

The order asked for should have been made. If the mortgagees had received the rents, then no doubt a fresh account would have to be taken, but the receiver was the officer of the Court and received the rents for the persons entitled. The Plaintiffs are entitled to them; they are entitled to their judgment and are guilty of no default—but without any condition that judgment is taken away, and they are exposed to further risk and costs, and that in a case where there is no real intention of redeeming.

[They referred to *Constable* v. *Howick* (1); *Prees* v. *Coke* (2).]

*Willis Bund*, for *puisne* mortgagees, opposed.

THE COURT (*Cotton*, *Bowen*, and *Fry*, L.JJ.), agreed with Mr. Justice *Pearson* that the money in the receiver's hands could

(1) 5 Jur. (N.S.) 331. (2) Law Rep. 6 Ch. 645, 650.

C. A. 1886 JENNER-FUST v. NEEDHAM.

not be paid over to the Plaintiffs, but must be brought into account between the Plaintiffs and Defendants, but in order to save the expense of a reference to Chambers, with the consent of counsel for the Respondents, ordered the appeal to stand over to the first motion day in the next term (4th of May), and gave the Plaintiffs liberty to file an affidavit bringing down the account to that day, shewing on the one side all moneys received, and on the other the interest accrued down to that day—and ordered the mortgagor to be served.

On the 4th of May the application was renewed for the purpose of fixing a day for redemption—and an affidavit was produced shewing the precise sum due.

*Napier Higgins*, Q.C., asked for an early day to be fixed for redemption, and asked for interest to be calculated up to the day fixed.

*Chubb*, for the mortgagor, asked that the usual period of three months should be given.

*Willis Bund* objected that the receiver might have received further rents since the date of the last affidavit (29th of January, 1886), and that he should file a fresh affidavit.

COTTON, L.J.:—

We are of opinion that there is no probability of redemption, and we therefore think that the 4th of June is a reasonable date to fix for redemption. We think, however, that the receiver should make a further affidavit, stating that he has received no subsequent rents; and that if he cannot do so the matter must come before the Court again. We cannot allow the mortgagees the subsequent interest up to the 4th of June, one of the terms upon which the reference to Chambers was waived being that they should forego their claim to such interest.

LINDLEY AND LOPES, L.JJ., concurred.

Solicitors for Appellants: *Russell & Hill.*
Solicitors for Respondents: *A. Hunt; Kime & Hammond.*

M. W.

## JONES *v.* SLEE.

C. A.
1886
V.-C. B.
*April* 9.
C. A.
*May* 15.

*Friendly Society—Jurisdiction of County Court—Special Resolution for Amalgamation—Dissatisfied Members*—38 & 39 *Vict. c.* 60, *ss.* 22, 24, *sub-s.* 8; *s.* 25, *sub-s.* 7; *s.* 30, *sub-s.* 10 [*Revised Ed. Statutes, vol. xvii., pp.* 680, 683, 685, 690]—*Prohibition.*

The committee of a friendly society having agreed for the amalgamation of the society with another company, summoned a general meeting in order to pass a special resolution for carrying the amalgamation into effect. Some of the members, who were dissatisfied with the provision proposed to be made for the satisfaction of their claims, filed a plaint in the County Court to restrain the society from carrying into effect the amalgamation, and obtained a receiver of the assets of the society, although the resolution for amalgamation had not then been passed. The public officer of the society applied for a writ of prohibition to restrain the proceedings in the County Court:—

*Held* (affirming the decision of *Bacon*, V.C.), that the County Court had no jurisdiction to interfere with the action of the society until the special resolution had been passed and confirmed, and a writ of prohibition was ordered to issue.

THE *Swansea Royal and South Wales Union Friendly Society* was a society registered under the *Friendly Societies Act*, 1873, having been established in 1869. Its principal office was at *Swansea*, and it carried on business in *South Wales* and elsewhere, and had upwards of 60,000 members, many of whom lived more than ten miles from *Swansea*. On the 9th of March, 1886, the committee made a provisional agreement with the *London, Edinburgh, and Glasgow Assurance Company* for an amalgamation of the two companies. On the 26th of March a special resolution was passed at a general meeting of the *Swansea Royal and South Wales Union Friendly Society* sanctioning the amalgamation on the terms of the agreement.

On the 24th of March the Plaintiffs, who were members having claims on the funds of the society, brought a plaint in the County Court of *Glamorganshire* against the secretary on behalf of the society, alleging that the committee were taking steps to amalgamate the society with the *London, Edinburgh, and Glasgow Assurance Company*, and that the Plaintiffs were dissatisfied with

C. A. 1886 JONES v. SLEE.

the provisions made for satisfying their claims, and asking for relief.

On the 25th of March the County Court Judge, on an *ex parte* application by the Plaintiffs, appointed a receiver to get in the assets of the society.

On the 1st of April, 1886, the Defendant obtained from Vice-Chancellor *Bacon* a rule *nisi* for a writ of prohibition to restrain the County Court Judge and the Plaintiffs from proceeding under the plaint.

On the 9th of April, 1886, the matter was argued before Vice-Chancellor *Bacon*.

*Marten*, Q.C., and *Ashton Cross*, for the Defendant.

*Cookson*, Q.C., and *Seward Brice*, for the Plaintiffs.

The following clauses of the *Friendly Societies Act*, 1875 (38 & 39 Vict. c. 60), were specially referred to: sect. 22; sect. 24, sub-s. 8; sect. 25, sub-sect. 7; sect. 30, sub-sect. 10 (1).

(1) Sect. 22: "Every dispute between a member or person claiming through a member or under the rules of a registered society, and the society, or an officer thereof, shall be decided in manner directed by the rules of the society, and the decision so made shall be binding and conclusive on all parties without appeal, and shall not be removable into any Court of Law or restrainable by injunction; and application for the enforcement thereof may be made to the County Court."

Sect. 24 relates to special resolutions.

Sub-sect. 8 (*a.*): "No special resolution by any society for any amalgamation or transfer of engagements under this section is valid unless five-sixths in value (to be calculated as for dissolution) of the members assent thereto either at the meetings at which such resolution is passed and confirmed, or one of them, or in writing, if such members were not present thereat, nor without the written consent of every person for the time being receiving or entitled to any relief, annuity, or other benefit from the funds of the society, unless the claim of such person be first duly satisfied, or adequate provision be made for satisfying such claim."

(*b.*) "The provisions hereinafter contained in case of dissolution as to the punishment of officers and the remedy of members or persons dissatisfied with the provision made for satisfying their claims, shall apply to the case of amalgamation and transfer of engagements."

Sect. 25. "With respect to the dissolution of registered societies, the following provisions shall have effect: . . .

Sub-sect. 7 (*d.*): "If any member of a dissolved society, or person claiming any relief, annuity, or other benefit from the funds thereof, be dissatisfied with the provision made for satisfying his claim, such member or other person

BACON, V.C.:—

I have heard this case argued very carefully and with a great deal of earnestness and ingenuity. The learned counsel for the Plaintiffs has tried to withdraw my attention from the only matter which is at issue upon this motion, but the only material contention was that upon sect. 22.

This unfortunate subject of friendly societies has been the subject of litigation for more than fifty years certainly, and I think very few years in that interval have elapsed without the Statute Book being loaded with Friendly Society Acts, at least until the year 1875, when an Act of Parliament was passed after great deliberation, with very great care and consideration for the rights of all the subscribers chiefly and the interests of the public besides, and a code is there laid down for regulating their proceedings. Among other things that the society may do is, it may discontinue its operations and transfer them to some other society. It cannot do that without the consent of the requisite number of subscribers. It is between them that the dispute, if there is any, exists, it is not with the society. All that the society has done has been to have a meeting convened and submit this question to the consideration of the shareholders, and 50,000 out of 60,000, as stated in the affidavit, and there is no attempt to contradict it that I know of, have voted for amalgamation. If that takes place it will be done according to law. Then the tribunal to appeal to is not the County Court. The County Court has no more to do with that than it has with a case of horse

---

may apply to the County Court of the district within which the chief or any other place of business of the society is situate for relief or other order, and such Court shall have the same powers in the matter as in regard to the settlement of disputes under this Act."

Sect. 30 applies only to friendly societies receiving contributions by means of collectors at a greater distance than ten miles from the registered office of the company. The *Swansea Royal and South Wales Union Society* was one of these.

Sub-sect. 10. "In all disputes between a society and any member or person insured, or any person claiming through a member or person insured, or under the rules, such member or person may, notwithstanding any provisions of the rules of such society to the contrary, apply to the County Court, or to the Court of summary jurisdiction for the place where such member or other person resides, and such Court may settle such dispute in manner herein provided."

C. A. 1886 JONES v. SLEE. V.-C. B.

stealing, for example. The statement in the plaint is this:—"The Plaintiffs are members of, or persons having claims against the funds of the *Swansea Royal and South Wales Union Friendly Society*, the committee whereof are taking steps to amalgamate the same with the *London, Edinburgh, and Glasgow Assurance Company*. The Plaintiffs are dissatisfied with the provision to be made for satisfying their claims." What jurisdiction by any construction of the word "dispute" can it be contended that that gives to the County Court? The jurisdiction is elsewhere. The County Court jurisdiction is not ousted in any degree upon any of the topics to which the Act of Parliament extends their jurisdiction. It gives the County Court no power to entertain such a claim as that. Whether or not they are dissatisfied, if they are outvoted the votes of the requisite majority must prevail, and the amalgamation must, I suppose, take place. While that is pending, and before the day upon which the resolution is or is not to be confirmed, some ingenious people think they can plunge this society, not a very rich one, with very numerous subscribers, but very scanty means, into litigation in the County Court first, and perhaps this Court afterwards, and some other Court for a third time, and they get up this trumpery dispute at the cost, as it is supposed, of the subscribers. So far as I am concerned I shall take care that the subscribers shall suffer no loss by any costs which are incurred. What will be done elsewhere must be decided elsewhere. For the present I do without hesitation grant a prohibition against the County Court meddling with the matter, which is not within its jurisdiction or province. I need not say I do that with all respect to the learned Judge of the County Court, who, I have no doubt, acted upon some representation made to him which is not before me, and which might account for his making the order which is now complained of. As the matter stands upon the plain construction of the Act of Parliament, without going more particularly into the evidence which has been mentioned, and which will have to be considered some other day, the question of costs has to be determined. I think the Defendant is entitled to the order he asks.

C. A.

On the 12th of April a second meeting of the members was held, at which the resolution passed at the previous meeting was

duly confirmed. The Plaintiffs now appealed from the order of the Vice-Chancellor. The appeal was heard on the 15th of May, 1886.

*Cookson*, Q.C., and *Seward Brice*, for the Appellant:—

The plaint is filed under sect. 24 of the *Friendly Societies Act*, 1875 (38 & 39 Vict. c. 60). That section gives power to friendly societies by special resolution (which is there defined), to amalgamate with and transfer its engagements to another society, but by sub-sect. 8, clause (*a*), it is enacted that no special resolution for any amalgamation or transfer of engagements shall be valid unless five-sixths in value of the members assent, "nor without the written consent of every person for the time being receiving or entitled to any relief, annuity, or other benefit from the funds of the society, unless the claim of such person be first duly satisfied, or adequate provision be made for satisfying such claim."

Then the next clause, (*b*), enacts that the provisions hereinafter contained, in case of dissolution, as to the remedy of members or persons "dissatisfied with the provision made for satisfying their claims, shall apply to the case of amalgamation and transfer of engagements." Then sect. 25, sub-sect. 7 (*d*), provides that in case of dissolution if any member or person claiming any relief, &c., from the funds, "be dissatisfied with the provision made for satisfying his claim," he may apply to the County Court of the district, and "the Court shall have the same powers in the matter as in regard to the settlement of disputes under this Act." The Plaintiffs complain that no adequate provision has been made for satisfying their claims. It is true that when the plaint was filed the special resolution had not been passed. But there was little doubt that the committee would carry it, and there was no reason why the Plaintiffs should not apply at once to detain them from proceeding.

*Rigby*, Q.C., *Marten*, Q.C., and *Ashton Cross*, for the Respondent, were not called on.

LINDLEY, L.J:—

In this case, I am of opinion that the Appellants cannot succeed. On the 9th of March, 1886, the committee of the society entered

C. A. 1886 JONES v. SLEE. Lindley, L.J.

into an agreement with the *London, Edinburgh, and Glasgow Assurance Company* for an amalgamation of the two companies. This they proceeded to carry out in accordance with the *Friendly Societies Act*, namely, by passing a special resolution. It was no part of their intention to carry out the agreement independently of the Act, but only by the method pointed out by the Act. What was that method? First, a resolution was to be carried at a general meeting, and that had to be confirmed at a subsequent meeting. Then the Act proceeds to point out in sect. 24, sub-sect. 8 (*b*), what is to be done after the resolution has been passed if any persons having claims on the society are dissatisfied with the provision made for them, namely, by application to the County Court. But the County Court has no jurisdiction whatever, except under this section, and the one thing which is a condition precedent to its jurisdiction is the passing of the special resolution. Here, before any special resolution was passed, and before it was known whether it would be passed or not, the Plaintiffs take action and file a plaint in the County Court, in which, following the words of the clause in the Act, they say that they are persons who are dissatisfied with the provision made for satisfying their claims. The Plaintiffs wish to read this as it were the provision "to be made," but when we look at the Act it is clear that it means the provision which has been made by the special resolution. I am therefore of opinion that the application to the County Court was premature, and that the appeal must be dismissed with costs.

FRY, L.J.:—

I am of the same opinion. The question turns on the 24th section of the *Friendly Societies Act*, 1875. That section begins thus: "With respect to special resolutions by registered societies, and to the proceedings which may be taken by virtue thereof." There it is obvious that all the provisions relative to such proceedings are upon condition of the passing of the special resolution, and that the proceedings must be subsequent to the resolution. Then it goes on to enact in sub-sect. 8 (*a*), that no special resolution for any amalgamation or transfer shall be valid unless five-sixths in value of the members assent to it, or without the

written consent of every person receiving or entitled to any relief, annuity, or other benefit from the funds of the society, "unless the claim of such person be first duly satisfied or adequate provision be made for satisfying such claim." This is followed by an enactment in sub-sect. 8 (*b*), that certain other provisions for the remedy of members or other persons dissatisfied with the provision made for satisfying their claims shall apply to the case of amalgamation or transfer. In my opinion it is perfectly clear that that refers to the provision made by the special resolution. It appears to me, therefore, that the Plaintiffs have been premature in commencing proceedings in the County Court. The difference is a very material one. If the Plaintiffs' construction of the Act is right, it would enable any member who objected to a special resolution to institute an inquiry in the County Court into the effect of the provisions intended to be inserted in it. I can hardly conceive a more idle proceeding than an inquiry into the sufficiency of the provisions contained in a resolution which might never be passed. For these reasons I am of opinion that the County Court had no jurisdiction in the present case, and that the appeal must be dismissed.

LOPES, L.J.:—

I am of the same opinion. The time at which we are to look is the time when the plaint was filed. At that time no such special resolution had been passed as is mentioned in the Act, and therefore the County Court had no jurisdiction.

I am clearly of opinion that the Vice-Chancellor was right.

Solicitors: *R. White*, agent for *H. F. A. Davis, Swansea; Wynne-Baxter, Rance, & Meade*, agents for *W. Cox, Swansea.*

M. W.

V.-C. B.

1886

May 15, 17.

## MARTIN *v.* SPICER.

[1885 M. 3051.]

*Practice — Interrogatories — Summons for Leave to deliver — Chief Clerk — Settling Interrogatories—Relevancy or irrelevancy—Jurisdiction—Rules of Supreme Court*, 1883, *Order* XXXI., *rr.* 1, 6, 7.

Upon an application for leave to exhibit interrogatories under Rules of Supreme Court, 1883, Order XXXI., rule 1, it is not necessary for the applicant, nor can he be required, to produce a copy of the proposed interrogatories: and if produced to the Chief Clerk on the hearing of the summons he has no right to settle them, or to decide upon the relevancy or irrelevancy of specific interrogatories and allow or disallow them accordingly. All that is necessary to support the summons is a statement by the applicant —not necessarily in writing—as to the general nature and scope of the proposed interrogatories, so as to enable the Court to decide whether he is entitled to the whole or any part of what he asks.

*Hall* v. *Liardet* (1) approved of and followed.

### ADJOURNED SUMMONS.

The statement of claim alleged that by several conveyances executed in 1867, several houses forming a block called *Cromwell Gardens, South Kensington*, were conveyed by the Commissioners for the Exhibition of 1851 to *John Spicer* in fee, subject to a restrictive covenant by him not to carry on upon any part of the premises any trade or business; that one of these houses, No. 2, *Cromwell Gardens*, was, in consideration of £11,000, demised by *John Spicer* to the Plaintiff by lease dated the 24th of December, 1880, for the term of eighty years at the annual rent of £120, the lease containing a restrictive covenant by the lessee similar to that in the conveyance of the house: that the Plaintiff took the lease on the faith of representations made by *Spicer* that the conveyances of the other houses in the block contained a similar covenant and that a like covenant would be inserted in all future leases of any of the houses; and that the Defendant, *George John Spicer*, the devisee of *John Spicer*, who had died, had agreed to sell to the Defendant, *Reginald Brett*, and *Brett* had agreed to sell to the Defendants, the *Cromwell Gardens Hotel Company, Limited*, certain houses in the block for the purpose of conversion

(1) W. N. 1883, pp. 165, 194.

into an hotel, which would cause great annoyance and damage to the Plaintiff. The Plaintiff accordingly claimed an injunction to restrain the Defendants from carrying on upon any part of the property so agreed to be sold the trade or business of an hotel, or any other trade or business.

The Defendants having delivered defences, the Plaintiff took out a summons under Rules of Supreme Court, 1883, Order XXXI., rule 1, for leave to deliver interrogatories to the Defendants Spicer and Brett.

On the summons coming before the Chief Clerk a draft of the proposed interrogatories was submitted to him. Some he allowed; others he struck out, wholly or partially, on the ground that the matters interrogated upon had been admitted in the defences; and others, again, he struck out, wholly or partially, on the ground that they were not material to the matters in question in the action. The summons was then, at the Plaintiff's instance, adjourned to the Judge, who ordered it to be adjourned into Court, and it now came on for hearing.

*Millar*, Q.C., and *Kirby*, for the Plaintiff:—

On a summons under Order XXXI., rule 1, for leave to exhibit interrogatories the Chief Clerk has no jurisdiction to settle the interrogatories; his duty is simply to decide, generally, whether the case is one for interrogatories or not: *Swabey* v. *Dovey* (1); *McIlroy* v. *Duncan* (2). He has no right even to require a copy of the proposed interrogatories to be produced on the summons: *Hall* v. *Liardet* (3). If, after the interrogatories are delivered, the party interrogated objects to them on the ground that they are prolix, unnecessary, or scandalous, he has his remedy under rules 6 and 7 of the Order.

*Marten*, Q.C., for the Defendant *Brett*:—

This is not a case for interrogatories at all, the question at issue being simply as to the meaning of the restrictive covenant. The Judge has a discretion in granting leave to exhibit interrogatories: *Hall* v. *Liardet*; *Aste* v. *Stumore* (4): and before

(1) *Ante*, p. 352.
(2) W. N. 1884, p. 48.
(3) W. N. 1883, pp. 165, 175, 194.
(4) 13 Q. B. D. 326.

V.-C. B. 1886 MARTIN v. SPICER.

he can exercise his discretion he must see whether the proposed interrogatories are relevant or not. I submit, therefore, that the Chief Clerk was perfectly right in going into them in the present case.

*E. Ford*, for the Defendant *Spicer*, took the same view.

*Kirby*, in reply.

BACON, V.-C.:—

Everybody will agree that the question now raised is one of very great importance.

The object of the new practice is to remedy what was formerly an abuse of and a defect in the procedure with regard to interrogatories, namely, the needless expense frequently caused to the parties, and, what was often of much more importance to the party interrogating, enabling him to avail himself of the opportunity of postponing the ultimate decision of the Court between the parties.

Rule 1 of Order XXXI. is, in my opinion, so clear and distinct in its terms, that there can be no reasonable doubt about the meaning of it. The rule, first of all, enables any party to an action by leave of the Court or a Judge to deliver interrogatories in writing; and this is followed by a proviso that "interrogatories which do not relate to any matters in question in the cause or matter shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness."

What the Plaintiff seeks in this case is this: he desires to do that which rule 1 expressly prohibits him from doing, in order to avail himself of that which the rule endeavours to prevent. His object is to get a cross-examination of a witness by means of interrogatories.

Now, what is the duty of the Court? First of all, the power of a party to deliver interrogatories is circumscribed by the necessity of getting leave. It is clear in many cases that there is no necessity whatever for interrogating. Rule 1 contemplates that by carefully providing that interrogatories which do not relate to the matters in question in the cause shall be deemed

irrelevant. The duty is, in my opinion, cast upon the Judge whose sanction to exhibiting interrogatories is requested, to see that, when permission is asked, it is reasonably asked, and that it is relevant to the matter in question. How can the Judge discharge this duty unless he knows what the interrogatories proposed to be exhibited are about?

A case has been referred to before Mr. Justice *Field*, *Hall* v. *Liardet* (1), in which, on a summons by the plaintiff for leave to exhibit interrogatories, the defendant objected that he ought to be served with a copy of the interrogatories the Plaintiff desired to exhibit; but the learned Judge decided that this was not so—that the plaintiff was under no such obligation. There Mr. Justice *Field* distinctly recognises the necessity and the duty imposed upon the Judge of ascertaining what the interrogatories are about. There must, he says, be a statement as to the nature and scope of the interrogatories—a statement not necessarily in writing, but a statement there must be. The party applying for leave states the nature of the interrogatories *en bloc:* if the Judge finds they are, generally speaking, relevant, it is not his duty, nor is it within his power, to refuse leave to deliver them. So it is not the duty of the Chief Clerk in the first instance to decide whether under rules 6 and 7 the interrogatories have exceeded the bounds laid down by those rules. In my opinion the Plaintiff should simply ask for leave to deliver interrogatories, and in so doing should state—I do not say in writing—for the information and sanction of the Court what are the subjects upon which he desires to interrogate. I think the Chief Clerk has done in this case what may be, no doubt, often greatly to the benefit of the parties—he has gone into the question whether the interrogatories are or are not relevant. He has refused leave to deliver some, but others he has allowed. Now I do not think the Chief Clerk has power under this order to disallow some and allow others. It appears to me that the proper course now is to give the Plaintiff leave under rule 1 to exhibit interrogatories, and then, when he states as to what subject he desires to exhibit interrogatories, the Court or a Judge will decide whether he is entitled to the whole or any part of what he asks.

(1) W. N. 1883, p. 165.

V.-C. B. 1886 MARTIN v. SPICER.

Then it is said that if any of the interrogatories are improper, the party interrogated has his remedy under rules 6 and 7; but it was never intended that there should be that cumbrous, troublesome, and dilatory proceeding. That is a mere invitation, to which the Court cannot possibly assent, to postpone the decision of the case in the interests of a party who does not wish to hasten the decision.

It appears to me that the Plaintiff should now be at liberty to renew his application for leave by stating the grounds upon which he wishes to interrogate; though, as I said before, I do not say that statement should be in writing. That is all I can do with the summons. The costs of the application will be costs in the action.

I desire to express my opinion that the rule to be followed is very clearly laid down by Mr. Justice *Field* in his judgment, as afterwards corrected by the reporter, in *Hall* v. *Liardet* (1), and I see no reason for differing from what he has said. He has said that in applying for leave to exhibit interrogatories there must be a statement by the parties, but not necessarily a statement in writing, as to the general nature and object of the interrogatories. In the present case I have a discretion as to whether I shall allow them or not, but I shall not exercise it until I know what they are about. The Chief Clerk has exceeded his powers, and therefore, as I have said, I give the Plaintiff liberty to renew his application, supported by some verbal or other statement as to the nature of the proposed interrogatories.

Solicitors: *Ashurst, Morris, Crisp, & Co.; Foster & Spicer; O. E. Dawson.*

(1) W. N. 1883, pp. 165, 194.

G. I. F. C.

KAY, J.
1886
April 13.

## *In re* BROWN.
## DIXON *v.* BROWN.

[1878 B. 29.]

*Trustee—Breach of Trust—Bankrupt Trustee entitled to Equitable Interest—Mistake of Law—Bankruptcy.*

A testator devised real estate to his nine children *nominatim* as tenants in common, giving a power to three of them to sell the whole to avoid the difficulties of partition. *W.*, one of the three, conducted certain sales under the power, retained more than his share of the purchase-moneys, and went into liquidation. Further sales were effected, and out of the proceeds a further sum was paid to *W.'s* trustee in liquidation in respect of, and in excess of, his share:—

*Held*, that all purchase-moneys received by the trustees were impressed with a trust under the will, and that *W.'s* equitable interest therein was liable to recoup the other beneficiaries; and this being so, that the payment to his trustee in liquidation was made in mistake of law, and (in analogy to the decisions in Bankruptcy of *Ex parte James* (1) and *Ex parte Simmonds* (2)) must be refunded by such trustee.

*THOMAS BROWN*, who died in April, 1875, by his will, dated in 1873, specifically devised real estate to his sons *Thomas*, *John*, *William*, *Frederick*, *Francis*, and *Charles*, and his daughters *Mary*, *Fanny*, and *Katherine*, their heirs and assigns, as tenants in common; and as he had thought it more desirable to devise his said real estate to all his children as tenants in common in fee simple, and some of them might desire the value of their several shares and interests of their inheritances, and in order to avoid any difficulties in partition on the sale of the several individual undivided interests and shares, he directed and empowered his sons *Thomas*, *John*, and *William*, their heirs and assigns, in their discretion, and at such times as they might judge fitting, upon request of them or of any of his other children, to ascertain the value of the interests of his children, or any of them, who should desire partition or request payment, and pay them the ascestained value thereof, or to sell all, or any, or such parts of his said real estates as they should think right and necessary, and to

(1) Law Rep. 9 Ch. 609. (2) 16 Q. B. D. 308.

KAY, J.
1886
*In re* BROWN.
DIXON *v.* BROWN.

such of his children as might desire or require, but in the meantime to pay and divide the rents and profits equally among them. And he gave to his sons *Thomas*, *John*, and *William*, the same power and authority over his estates for such purposes as he had, as though he was living, and directed that their receipts should be a good discharge to all tenants on payment of their rents and for any purchase-moneys. The testator then gave all the residue of his real and personal estate to his said children in equal shares as tenants in common, and appointed his sons *Thomas*, *John*, and *William* executors of his will.

After the death of the testator, by an indenture, dated the 16th of September, 1876, to which all the children of the testator were parties, after reciting a determination to sell his real estate, the other children conveyed their shares to *Thomas*, *John*, and *William Brown* upon trust for sale; and, under the powers of the will and this deed, the three trustees sold considerable portions of the real estate.

*William Brown*, one of the trustees and executors, was a solicitor, and acted for the trustees and executors in the administration and realisation of the estate. He was allowed to receive the purchase-moneys of the portions of the estate sold from time to time, and he duly divided part of these trust moneys, but, with the consent of his co-trustees, he retained other part of them in anticipation of his own share, and at the date of his bankruptcy hereinafter mentioned he had thus appropriated, as it afterwards appeared, £1500 more than his proper share of such purchase-moneys.

This action was brought on the 15th of January, 1878, to have the estate of the testator administered, and the trusts of his will and of the deed of the 16th of September, 1876, carried into execution under the direction of the Court.

On the 19th of January, 1878, *William Brown* presented a petition for the liquidation of his affairs in Bankruptcy, and on the 11th of February, 1878, a resolution for liquidation was passed, and a trustee was appointed, who was subsequently joined as a Defendant to the action.

Before the action was brought the trustees had entered into contracts for the sale of other portions of the testator's real

estate, and during the progress of the action these contracts were carried out and the purchase-moneys were paid to the trustees.

Out of these moneys the trustees paid £500 in respect of *William Brown's* shares to his trustee in the liquidation, who gave an undertaking not to distribute it until the rights of the parties should be determined, and moved on the 4th of March, 1886, to be released from his undertaking.

This application now came on by order as an adjourned summons.

*Hastings*, Q.C., and *Badcock*, for the trustee in liquidation of *William Brown*:—

Under the devise in the will of the testator, *William Brown* took a legal estate as tenant in common in the lands therein comprised. This estate cannot, as against the trustee in liquidation, be taken and applied in replacing any loss occasioned by a breach of trust on the part of the devisee: *Fox* v. *Buckley* (1). There is, no doubt, a power of sale of a peculiar character in the will, but the sales did not take place under that power. They were, in fact, effected under the deed of the 16th of September, 1876, under which the beneficiaries themselves sold. There is, therefore, no equitable interest which the Court can lay hold of or attach for the purpose of recouping the breach of trust involved in the over payment of his share.

*Northmore Lawrence*, for the Defendants, the trustees and executors other than *William Brown*:—

The trustee in liquidation cannot retain moneys paid to him under a mistake in law. The Court of Bankruptcy would not allow him as one of its officers to do so. He holds moneys in his hands upon trust for equitable distribution, and cannot avail himself of a technical rule to retain, as against persons really entitled to it, money which came to his hands under such circumstances. As a matter of common honesty he must pay it back: *Ex parte James* (2), or if he has parted with it, he must recoup the persons really entitled out of such assets of the bankrupt as

(1) 3 Ch. D. 508. (2) Law Rep. 9 Ch. 609.

KAY, J.
1886
*In re* BROWN.
DIXON *v.* BROWN.

may subsequently come to his hands: *Ex parte Simmonds* (1). And the same principles apply to this case.

*C. T. Mitchell*, for the Plaintiffs, who were the trustees of the marriage settlement of one of the beneficiaries under the will.

*Badcock*, in reply:—

The trustee in bankruptcy is not an officer of this Court, and this Court is not now administering the bankrupt's estate, so that the same considerations do not apply.

KAY, J.:—

It has always been a rule of the Court of Chancery that, if a trustee misappropriates trust money, and has an equitable interest under the trust deed, the Court will not allow him to receive any part of the trust fund in which he is equitably interested under the trust until he has made good his default as trustee. That is a doctrine which is not in the least in question, and is very thoroughly established. But if the trustee has under the will or other instrument which created the trust a legal interest in land, which is not bound by the trust at all, then the Court of Equity has no power to lay hold of that legal interest or to assert anything in the nature of a lien or charge upon it in order to recoup the breach of trust. That is the result of the decision in *Fox* v. *Buckley* (2), which, of course, stands upon a very plain ground, and the distinction between that decision and the rule I have just mentioned is very clear.

The question here is, which of these two doctrines is applicable to the facts of this case, which are these. [His Lordship then stated the will of *Thomas Brown*, and, after remarking that the gift to his sons and daughters was a legal devise, continued:—] The direction and power given to his trustees to ascertain and pay to his children on their request the value of their interests, or to sell all or any part of his real estate, was clearly a power in the nature of a trust, but the legal estate was not vested in the trustees. Supposing that power had been exercised, what would have been the consequence? I have heard an argument which

(1) 16 Q. B. D. 308. (2) 3 Ch. D. 508.

I was surprised to hear, for I thought this was settled. In the 2nd chapter of Lord *St. Leonards'* well known book on Powers (1) he defines powers in this way. After having dealt with powers under the *Statute of Uses* he deals with those that are not under that statute, and he says: "Powers are either common law authorities; declarations or directions operating only on the conscience of the persons in whom the legal estate is vested; or declarations or directions deriving their effect from the *Statute of Uses*," and then, shewing what the common law authorities are, he refers to the second class, and he gives this description of them (2): "A power to dispose of an estate, or a sum of money, where the legal interest is vested in another, is a power of the second sort. The legal interest is not divested by the execution of the power, but equity will compel the person seised of it to clothe the estate created with the legal right."

I thought the point was quite unarguable, but some argument has been raised on the nature of this power. The estate is not vested in the persons to whom the power is given. It is vested in other persons. An undivided share may be vested in each of them, but the other shares and the bulk of the estate are vested in other persons. There is an unquestionable power to sell, as I read it—a power to sell in order to avoid the difficulties of partition. The testator contemplated that each individual might sell his undivided share. Then the purchaser of that undivided share might require to have a partition, and in order to avoid all the expense and difficulty of partition, the testator gave this power, which is precisely the kind of power which Lord *St. Leonards* refers to in the passage I have read, according to which the trustees might sell this estate, and equity would compel the persons in whom the legal estate was vested to convey according to the trustees' contract. [His Lordship then stated the other facts of the case, and continued:—]

Just observe what is the position. Beyond question everything which the trustees sold when converted into money would be impressed with the trusts which this will impresses on money received by the trustees under that trust for sale, which was therefore a trust which could be administered by the Court, and

(1) 8th Ed. p. 45. (2) 8th Ed. p. 46.

KAY, J.
1886
*In re* BROWN.
DIXON *v.* BROWN.

is sought to be so administered in this action. This money, when received (I do not care by whom received), was money impressed with the trust of that power of sale under which this estate had been sold. What happened was, that, at first, the whole of the money was paid into the hands of the solicitor to the trustees, or, in other words, into the hands of the trustees. But then it was considered that the trustee in the liquidation of *William Brown* was entitled to his aliquot share of these moneys in respect of that portion of the estate which had been devised to him, and accordingly £500, being his share, was handed over to the trustee in his liquidation. If there was any mistake in law in so handing it over, I am supported by the decisions in Bankruptcy, which have been cited, of *Ex parte James* (1) and *Ex parte Simmonds* (2), in saying that the Court of Bankruptcy would not allow the ordinary defence of mistake of law to prevail. The Judges in those cases treat the assignee or the trustee in bankruptcy as being an officer of the Court, and lay down the rule that money paid to him in mistake of law must be repaid by him; and even if he has spent the actual money he will be ordered, according to the later of these decisions, to recoup the parties entitled to that money out of other of the bankrupt's assets coming to his hands afterwards. That, as Lord Justice *James* said in the earlier of those cases, is because the Court of Bankruptcy, in dealing with its own officers, thinks it right to be perfectly fair, and not to regard the technical rule, which is scarcely honest in some cases. Of course, I am not exercising the jurisdiction of the Court of Bankruptcy, but the question is submitted to this Court, and I have no doubt or hesitation in saying that a Court of the Chancery Division does not consider itself bound to act on principles less honest than the Court of Bankruptcy; and if this money was really paid to the trustee in the liquidation in mistake of law, I have no hesitation in saying that he must repay it, and if any order of the Court of Bankruptcy were necessary for that purpose, I presume the Court would make such an order. Now was there a mistake of law in this respect or not? That depends on whether or not *W. Brown* could, out of the proceeds of these sales made by him as trustee, say, "I

(1) Law Rep. 9 Ch. 609. (2) 16 Q. B. D. 308.

will, notwithstanding that I owe to the trust £1500, which I have paid myself in advance out of the other property I have sold as trustee, retain this £500 besides." You have only to state the proposition to shew what the obvious answer must be. Any moneys which came to the hands of *W. Brown* and his co-trustees were impressed with the trust. His interest in those moneys was only equitable, and, therefore, to these moneys this rule applies, that out of moneys to which he is beneficially entitled he cannot take one sixpence until he has recouped the trust moneys which he, as trustee, has put into his own pocket. I do not say this was at all improperly done, because I have no doubt when he did put these moneys into his own pocket he was intending only to pay himself in anticipation. He intended that any other moneys received by the trustees should go to pay the other *cestuis que trust*, and that he should receive no more until they were paid up equally with him. That is the equity which the Court of Chancery will enforce against him. Therefore, this case does not seem to me to come within the decision of *Fox* v. *Buckley* (1), but within the other class of cases which establish the rule that a trustee cannot take out of the trust fund anything at all until he has recouped the trust fund that which he has received out of it beyond his own interest. Here I must treat all moneys received from the sale of real estate by the trustees as being one fund divisible by those trustees among the persons to whom the real estate was devised. Out of some of these moneys he has received £1500 more than he ought, and others of those moneys have now come in under the same trusts. I must, therefore, hold that the £500 should not have been paid to the trustee in the liquidation, that it was paid in mistake of law, and that he is bound to repay it in order that it may be divided amongst the other beneficiaries so as to pay them, as far as possible, the same amount as *W. Brown* himself has received. The trustee in the liquidation will take his costs out of the debtor's estate. The trustees of the will may take theirs out of the fund.

Solicitors: *Crowders & Vizard; Travers Smith & Braithwaite; W. Bristow.*

(1) 3 Ch. D. 508.

W. W. K.

KAY, J.
1886
May 6.

## *In re* KINGDON.
## WILKINS *v.* PRYER.

[1884 K. 16.]

*Power in Settlement—Appointment by Will by Wife during Coverture—General Disposition by Will, after Death of Husband, with Clause revoking all former Wills—Revocation of first Will.*

A married woman having in a settlement a special power of appointment by will over real estate executed a will during coverture in 1866 appointing the same. After the death of her husband she made three other wills. In the first and second she said: "I revoke all other wills," and in the third: "I . . . . hereby revoke all wills, codicils, and other testamentary dispositions heretofore made by me, and declare this to be my last will and testament," and then disposed of all her estate "including as well real estate as personal estate over which I have or shall have a general power of appointment," but she did not in any way exercise or affect to exercise the power in the settlement, nor did she refer to it, or to the property the subject of the power:—

*Held*, that the testamentary appointment of 1866 was revoked.

### Adjourned summons.

By a settlement made by *Susan Simpson* in July, 1834, reserving to herself a life interest, certain real estates were settled upon her daughter, *Harriet Simpson*, for life, with remainder to any husband whom she might marry for life, with remainder to the use of all and every or such one or more of the children of the marriage as *Harriet Simpson* should by deed or will appoint, and in default of appointment to the use of all the children who should attain the age of twenty-one years in equal shares as tenants in common, and in case any child should die under the age of twenty-one years the share of such child was given to the survivors, or survivor, and in case all the children should die under the age of twenty-one years there was a gift over.

*Harriet Simpson* in 1846 intermarried with *John Henry Kingdon*. On the 17th of October, 1866, *Harriet Kingdon* by will, in which the settlement of 1834 was recited, after stating that she had three children, the issue of her marriage, living—one daughter and two sons—in exercise of the power given to her appointed

the real estate comprised in the settlement to the use of her daughter, her heirs and assigns, but in case her daughter should die without leaving any child or issue she appointed the same estate to her two sons, or such one of them as should be then living, and their, or his, heirs and assigns, and if both should be then living as tenants in common. No executors were appointed, and the will had never been proved.

In 1870 one of the sons died an infant.

On the 13th of April, 1871, the other son, who had attained the age of twenty-one years, died intestate, and on the 31st of January, 1874, *John Henry Kingdon* died, having by his will given all his real estate to his wife absolutely.

On the 23rd of June, 1874, *Harriet Kingdon* made her will, by which she disposed of all her own property, but she did not refer in any way to the power in the settlement, nor did she make any gift which could be an exercise of the power. The will ended with the words, "I revoke all other wills," and she appointed her daughter an executrix, and other persons executors.

On the 20th of June, 1875, *Harriet Kingdon* made another will (re-executed in June, 1877), in which she did not in any way exercise the power in the settlement, but she dealt with whatever property she had to dispose of, and that will also ended with the words, "I revoke all other wills." She on the 26th of November made another will. It commenced with the words: "I, *Harriet Kingdon*, of No. 10, *The Grove, Boltons, Kensington*, in the county of *Middlesex*, widow, hereby revoke all wills, codicils, and other testamentary dispositions heretofore made by me, and declare this to be my last will and testament," and then she disposed of the real and personal estate which she could dispose of under her general testamentary capacity, "including as well real estate as personal estate over which I have or shall have a general power of appointment," but she did not in any way exercise, or affect to exercise, the power in the settlement, nor did she refer to it or to the property the subject of the power in any way.

The testatrix died on the 3rd of April, 1879, leaving her daughter *Harriet Maria Jane*, who had attained the age of twenty-one years, and who was now the wife of *Ernest Wilkins*, survivor, and she brought an action for the administration of her late

KAY, J.
1886
*In re* KINGDON.
WILKINS *v.* PRYER.

mother's estate. This was a summons taken out by the Plaintiff, and the question was whether the will of 1866 made expressly in exercise of the special power in the settlement had or had not been revoked.

*Hastings*, Q.C., and *Begg*, for the Plaintiff:—

It is submitted that the will of 1877, which contained the clause, which it is alleged revoked all former wills, but which did not refer to the power specially given to the testatrix by the settlement of 1834, or deal with the estate mentioned in it, did not operate upon the will made in 1866 in exercise of the power, but that the words of revocation apply only to the wills made in 1874 and 1875: *In the Goods of Meredith* (1); *In the Goods of Joys* (2); *In the Goods of Merritt* (3); *In the Goods of Eustace* (4); *Sotheran* v. *Dening* (5); *Hughes* v. *Turner* (6); *Denny* v. *Barton* (7); *Sugden* on Powers (8); *Jarman* on Wills (9); *Farwell* on Powers (10).

The principle to be deduced from the authorities is, that the revocatory clause to be effectual must refer to the power and to the property which has been made the subject of it. The intention of the testatrix must govern, and it is to be gathered from the whole scheme of the will of 1877, and not by looking at the words of the revocatory clause merely. It is submitted that the testatrix did not intend to revoke the will of 1866, and further, that the words used were not sufficient to revoke the special appointment made by it.

The case of *Harvey* v. *Harvey* (11) may be cited against the Plaintiff's contention, but the other decisions which are expressly in point should be followed.

*W. Pearson*, Q.C., and *Dauney*, and *E. W. Byrne*, for the trustees, and other parties respectively, were not called upon.

(1) 29 L. J. (P. M. & A.) 155.
(2) 4 Sw. & Tr. 214; 30 L. J. (P. M. & A.) 169.
(3) 1 Sw. & Tr. 112; 4 Jur. (N.S.) 1192.
(4) Law Rep. 3 P. & M. 183.
(5) 20 Ch. D. 99.
(6) 4 Hagg. Eccl. 52.
(7) 2 Phillim. 575.
(8) 8th Ed. p. 458.
(9) 4th Ed., vol. i. p. 172.
(10) Pages 160 *et seq.*
(11) 23 W. R. 478.

KAY, J.:—

The question submitted to the Court is, whether a will made expressly in exercise of a special power of appointment in a settlement has or has not been revoked. [His Lordship then stated the facts of the case, and continued:—]

That was the nature of the appointment. In 1870 one of the testatrix's sons died an infant, and therefore he did not become entitled to anything under the trust in default of appointment, nor did he become entitled to anything under the appointment because he died in the lifetime of his sister. In 1871 the testatrix's other son died. He had attained the age of twenty-one years, and therefore would have become entitled under the trust in default of appointment. He died intestate, leaving his father, who died in 1874, his heir-at-law. The property which was the subject of the power was all real estate. The will which Mrs. *Kingdon* made in 1866 was a mere exercise of the power which she had of appointing that estate. She appointed no executors, nor did she in any way affect to make a testamentary disposition except under the special power. After the death of Mr. *Kingdon*, and therefore when she had attained testamentary capacity generally, Mrs. *Kingdon* made a will dated the 23rd of June, 1874, and by it she appointed her daughter—the Plaintiff—executrix, and other persons executors; and made a disposition of all her own property, but she did not refer in any way to the power in the settlement nor did she make any gift which could be in exercise of it. That will ended with the words, "I revoke all other wills." At that time Mrs. *Kingdon* had not made a will except that of 1866, which I have referred to, and which will was made in exercise of the special power in the settlement. Therefore the revocation was meaningless, unless it were a revocation of that will. No other meaning can be given to it. Mrs. *Kingdon*, on the 20th of June, 1875, made another will, which she re-executed in June, 1877, and by it she did not in any way exercise the power of appointment, but dealt with whatever other property she had to dispose of; and it ended with the same words: "I revoke all other wills." That will amounted of course to a revocation of the will of 1874, even if it were not a revocation of the prior will of 1866. Mrs. *Kingdon* then made another will dated

KAY, J.
1886
*In re* KINGDON.
WILKINS *v.* PRYER.

the 26th of November, 1877. It commenced with the words, "I, *Harriet Kingdon*," giving her description and so forth. [His Lordship read the words of revocation in the statement and continued:—] By that will Mrs. *Kingdon* disposed of the property which she could devise and bequeath under her general testamentary capacity and under any general power of appointment which she possessed, but it does not appear that she had any such power. She did not by that will in any way exercise or affect to exercise the power given to her by the settlement, nor refer either to it or to the property mentioned in it. The question is whether under the circumstances I ought to hold that the testamentary appointment of 1866 was or was not revoked. There is no question whatever that the words at the end of the will of June, 1874, were quite sufficient to revoke the testamentary appointment of 1866. It was admitted that if they had not that effect they were perfectly inoperative, as there was no other will to which they could possibly refer. By the Wills Act of 1837 (1 Vict. c. 26), it was enacted (sect. 22) "that no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and shewing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shewn." The will being after the Act would be a revocation, and according to the decision in *Sotheran* v. *Dening* (1), the testamentary appointment of 1866 could not since the Act be rehabilitated unless, looking at the section, it should be revived by a document shewing an intention to revive the same. In that case there was a will revoking a previous appointment and then another will revoking the former will, and it was held that the revocation by the last will of the intermediate will did not revive the first will. It is obvious from the language of the section that must be the effect of it. Then why should I, apart from any authority, say that the will of 1874 was not a good

(1) 20 Ch. D. 99.

revocation when in the case of *Sotheran* v. *Dening* (1) it was held that general words of revocation of all prior wills will *primâ facie* be sufficient to revoke a prior testamentary appointment, which was nothing more upon the face of it? *Primâ facie*, therefore, there was a revocation by the will of 1874, but if that be not enough the words with which the last will of all, that of 1877, was commenced would certainly be quite sufficient to revoke the testamentary appointment of 1866. Apart from authority I should have thought that it would be impossible for the Court to come to any other conclusion, because it would have to be arrived at upon the merest possible speculation, and how, as I have asked during the argument, can the Court know that it was not the deliberate intention of Mrs. *Kingdon* to revoke the appointment of 1866, and allow the estate to devolve as in default of appointment under the settlement of 1834? If I cannot know that, it is obvious that if I were to hold the words, which, *primâ facie* are quite sufficient to revoke the testamentary appointment, not to have that operation, I should arrive at that result by speculating as to what was the intention of the testatrix, and that for the reasons I have given might lead the Court into complete error. It may have been Mrs. *Kingdon's* intention to allow the property to devolve under the trust in default of appointment, and if I were to hold that the words of revocation, which may have been designedly inserted for the very purpose, are not to have any operation I might be defeating instead of carrying out her intention. The case is not like that of a person dying intestate, but it is a case in which the appointor in the exercise of a special power altered the devolution of an estate which was otherwise settled, and appointed it to go in a particular direction among her own children. Therefore apart from authority I hold that I cannot alter the meaning of the words. But it was said that there is sufficient authority to enable me to do it. My own opinion is so decidedly strong upon the subject that unless I am compelled to do so I certainly shall not follow it. Before referring to the authorities I should say that the principle alleged to be involved in them is that if there be a testamentary appointment, and afterwards a will which does not affect to

(1) 20 Ch. D. 99.

KAY, J.
1886
*In re* KINGDON.
WILKINS *v.* PRYER.

exercise the particular power, or refer to it, but deals with another power, and other property, then the will, although it contains an express revocation of all prior wills, must be held not to have revoked the testamentary appointment because the will does not deal with the property comprised in the power of appointment. For the reason I have given the argument does not satisfy my mind. Such a context does not, as it seems to me, in any way deprive the general words of revocation of their obvious force and meaning. Then as to the cases. I refer first to *In the Goods of Joys* (1), which came before Sir *Cresswell Cresswell*. There had been a testamentary appointment under a general power; then there was a will which did not exercise that power but contained a clause of revocation. That will was not one made under any general testamentary capacity, but was made in exercise of another and a different power, and the learned Judge, looking at the second will, held that the intention of the testator was merely to exercise the second power of appointment, and that the general words of revocation must be restricted in their meaning, and that they did not operate as a revocation of the previous appointment made under a different power. Unfortunately the reasons of the learned Judge for his decision are not given in the report, which is a short one. But in another case, that of *In the Goods of Merritt* (2), the same learned Judge on the 16th of April, 1858, said, "The argument against you (Dr. *Addams*) is, that the statute has given a technical effect to certain words to be found in the will. As at present advised I quite agree with you; but as the question has been raised on the statute let it stand over." Then, after an interval of four days, in a considered judgment he said: "I have looked at the statute in consequence of Dr. *Deane's* ingenious argument, that inasmuch as, since the *Wills Act*, a bequest in general terms will operate upon property over which there is a power of appointment, so a revocation in general terms will operate to revoke a will made in execution of a power, although it contains no reference to that will. I cannot agree to this. There are two sets of clauses in the *Wills Act;* the first, dealing with the modes of revocation

(1) 4 Sw. & Tr. 214; 30 L. J. (P. M. & A.) 169.

(2) 1 Sw. & Tr. 112; 4 Jur. (N.S.) 1192.

of testamentary papers; the second, with the modes of disposition of property. The first set do not affect this case, which therefore follows the old rule; and the will of 1846, in the execution of the power over the £650 Consols, remains unrevoked." That certainly is an acknowledgment, as far as it goes, of a general rule that general words of revocation will not in certain cases be held to have the effect of revoking a previous testamentary appointment. That, however, was again a case in which the second will was made under another and a different power, and the learned Judge held, following the previous decision, that such a will, containing general words of revocation, being merely on the face of it intended to exercise another and a different power did not operate as a revocation of the prior testamentary appointment. Those decisions are not exactly in point in this case. The will is not an exercise of a separate power of appointment. It may be a similar thing. The analogy is very close no doubt, but it is not the same thing. All the later wills after the first were made, not in exercise of any power at all, but in exercise of a general testamentary capacity which the testatrix had by reason of her being discovert before the will of 1874 was made. There is another case to which I will refer, that of *Harvey* v. *Harvey* (1), which came before a learned Judge very well versed in real property law (Vice-Chancellor Sir *Richard Malins*) and there the decision was exactly the other way. There the testator had made an appointment under a special power, and then he made a will which contained a general clause of revocation, but did not, according to the judgment of the learned Judge, exercise the power; still he held, as I should certainly have held, in the absence of any authority to the contrary, that the words used effected a revocation of the previous testamentary appointment which preceded that will, although the will did not exercise the power by any provision contained in it. The effect was that the property comprised in the power went as in default of appointment, and the will was held to be operative only upon the other property of the testator. In the case of *In the Goods of Eustace* (2), to which I ought to refer, the first will was revoked, and the learned Judge seems to have recognised the authority of

(1) 23 W. R. 478. (2) Law Rep. 3 P. & M. 183.

KAY, J.
1886
In re KINGDON.
WILKINS v. PRYER.

the cases in which the revocation was held not to have taken effect. In *Sotheran* v. *Dening* (1), to which I have already referred, a married woman having a general power of appointment by will over real estate executed a will appointing the estate. After the death of her husband she made another will, revoking all former wills, and it contained a general devise and bequest of all her real and personal estate. She afterwards made another will also revoking all former wills, and bequeathing her personal estate, but not devising or appointing her real estate, and it was held that the second will, by which, it should be observed, she disposed of her real estate, and which was therefore an exercise of the general power, revoked the first testamentary appointment, and the revocation having been made the 22nd section of the *Wills Act* applied and prevented the subsequent revocation of the second will from setting up the first will. The late Master of the Rolls in his judgment referred to the cases of *In the Goods of Joys* (2) and *In the Goods of Merritt* (3), and, as I understand, he did so without any very strong approbation of the principle supposed to be involved in them. I do not therefore think I am bound by any of the decisions to hold in this case that the testamentary appointment of 1866 was not revoked, and considering, as I do, that the Court is always much more likely to be right where it adheres to the words of a testator as closely as it possibly can, and does not attempt to speculate upon an intention not expressed by the words, it seems to me that it is by far the safer course to hold that the words used, which are quite sufficient to effect a revocation, had that consequence; and that the testamentary appointment of 1866 was in fact revoked; and, so far as it is to be regarded in the matter, I assume that the intention of Mrs. *Kingdon* was to allow, and advisedly, the estate to devolve as in default of appointment: and to dispose of her own property in the way she did dispose of it by her last will of 1877. The declaration will be that the testamentary appointment of 1866 was revoked.

Solicitors: *Mackeson, Taylor, & Arnould,* agents for *Kilby & Mace, Chipping Norton; Carr & Co.*

(1) 20 Ch. D. 99. (2) 4 Sw. & Tr. 214; 30 L. J. (P. M. & A.) 169.
(3) 1 Sw. & Tr. 112; 4 Jur. (N.S.) 1192.

T. F. M.

KAY, J.
1886
May 12.

*In re* McREA.
NORDEN *v.* McREA.
[1883 M. 330.]

*Practice—Costs — Creditor's Administration Action by Separate Creditor—Joint and Separate Creditors—Estate solvent as to separate Debts only—Costs of Plaintiff as between Solicitor and Client.*

In an action by a separate creditor, on behalf of himself and all other the creditors of a testator, who was one of a firm of traders, for a general administration of the testator's estate, the general estate was realised, and turned out sufficient to pay in full the separate creditors, but insufficient to pay in full the joint creditors of the testator:—

*Held*, that the Plaintiff was entitled to costs out of the estate as between solicitor and client.

## FURTHER CONSIDERATION.

This was an action by a separate creditor of a testator, who was a partner in a firm of traders, on behalf of himself and all other the creditors of the testator, for a general administration of his estate; there were both joint and separate creditors.

The general estate was realised under the proceedings in the action, and it turned out sufficient to pay the debts of the separate creditors in full, but not sufficient to pay in full the debts due to the creditors of the testator's firm.

Upon the further consideration of the action, the question arose whether the Plaintiff, who was (together with other separate creditors) to be paid the amount of his debt in full, was entitled to costs as between solicitor and client or only as between party and party.

*Crossley*, Q.C., and *D. L. Alexander*, for the Plaintiff:—

This action was brought by the Plaintiff not on his own account only, but on behalf of himself and all other the creditors of the testator: by his diligence a fund has been recovered for the benefit of the creditors, the whole of which belongs exclusively to them, and he is entitled to costs out of the estate as between solicitor and client: *Morgan* and *Wurtzburg* on Costs (1).

[KAY, J.:—Is there any authority for giving a creditor who is paid in full his costs as between solicitor and client out of the estate.]

(1) 2nd Ed. p. 202.

KAY, J.
1886
*In re* McREA.
NORDEN *v.* McREA.

In *Stanton* v. *Hatfield* (1), where the general fund was more than sufficient for the payment of the debts, the extra costs of the plaintiff were directed to be paid out of the general fund, being in fact contributed by all the creditors who partook of the benefit of the suit. If the Plaintiff only gets party and party costs, the extra costs will absorb part, or it may be the whole, of his debt, and he will be in a worse position than the other separate creditors, who, getting their debts in full, will reap the benefit of his successful proceedings. The same principle was adopted in *Goldsmith* v. *Russell* (2). The joint creditors have been by his means enabled to prove their debts and will get a dividend thereon, and this being so, they again cannot take advantage of the Plaintiff's action and leave him to bear a considerable portion of the costs.

[They also cited *Horne* v. *Horne* (3), and *Thomas* v. *Jones* (4); and during their argument, *Kay*, J., referred to *Brodie* v. *Bolton* (5).]

*Hastings*, Q.C., and *Renshaw*, for the Executors:—

The principle applicable is that if a plaintiff sues on his own account only, he only gets party and party costs; but if he sues on behalf of all the creditors, he is entitled to his costs as between solicitor and client.

[KAY, J., referred to *Sutton* v. *Doggett* (6) and *Barker* v. *Wardle* (7).]

If the whole fund recovered or secured by the Plaintiff's action belongs to the creditors, he is entitled to his costs as between solicitor and client, whether he gets his own debt paid in full or not.

*Kekewich*, Q.C., and *Dauney*, and *Levett*, for other parties.

KAY, J.:—

In this case I think the Plaintiff is entitled to costs out of the estate as between solicitor and client; and the principle on which he is so entitled is, that by his action and exertions the whole

(1) 1 Keen, 358.
(2) 5 D. M. & G. 547, 556.
(3) 14 W. R. 957.
(4) 1 Dr. & Sm. 134.
(5) 3 My. & K. 168.
(6) 3 Beav. 9.
(7) 2 My. & K. 818.

fund has been secured for the benefit of the creditors. It is true that there are two classes of creditors in this case; the joint creditors and the separate creditors, and the Plaintiff is a separate creditor. He and the other separate creditors will be paid in full, but then what remains will not be enough to pay in full the joint debts. Therefore the fact seems well established that the whole estate belongs to the creditors of the testator; but the peculiarity of the case is that the Plaintiff gets his debt paid in full. However, if the principle be that the Plaintiff is entitled to have solicitor and client costs out of the fund if it all belongs to the creditors, it cannot matter whether he gets his own debt paid in full or not. The same hardship would occur in either case, because if he does not get solicitor and client costs he is in a worse position than the other separate creditors; for the other separate creditors will get their debts paid in full, and will have no costs to pay, while the Plaintiff, who has been the principal actor in the matter, if he gets his debt paid in full, but is allowed party and party costs only, will have his debt diminished by the difference between the party and party costs he gets, and the solicitor and client costs he has to pay. I think the principle must be taken to be that which was laid down by *Kindersley*, V.C., in *Thomas* v. *Jones* (1), following Lord *Langdale's* decision in *Cross* v. *Kennington* (2):—"If a creditor files a bill on behalf of himself and all the other creditors, and it turns out that the estate applicable to the payment of debts is insufficient, the estate belongs to the creditors exclusively; and therefore if a creditor has for the benefit of all the other creditors instituted a suit, in which he has recovered a fund, it is extremely unreasonable that the fund which would be divisible among the creditors *pro ratâ* should be applied in the payment of debts without recouping that creditor what he has properly expended in recovering the fund, and he is clearly entitled to his costs as between solicitor and client, and not as between party and party only."

Solicitors: *H. Montagu; Arnold Williams & Bunn; Allen & Edwards; Scoles & Co.*

(1) 1 Dr. & Sm. 134, 136. (2) 11 Beav. 89.

W. W. K.

CHITTY, J.
1886
May 18, 19.

## DUKE OF MARLBOROUGH *v.* SARTORIS.

[1885 M. 641.]

*Settled Land Act*, 1882, s. 45—*Contract by Tenant for Life to sell—Notice to Trustees of Settlement.*

On a sale by tenant for life under the *Settled Land Act*, 1882, a notice to the trustees given less than a month before the contract but more than a month before the day fixed for completion, *held* a sufficient compliance with the 45th section.

*Semble*, a purchaser cannot avail himself of a defect in such notice as a defence to an action for specific performance.

### SPECIFIC PERFORMANCE.

In June, 1884, negotiations took place between the Plaintiff, the Duke of *Marlborough*, partly by himself and partly by Mr. *Watson*, his land agent, and the late Mr. *Sartoris*, for the purchase by the latter of the *Northleigh* property, forming part of the estates comprised in the settlement of the *Blenheim* estates, under which the Plaintiff was tenant for life, and which contained a power of sale of the settled estates by the trustees at the request and by the direction in writing of the tenant for life in possession.

The question of the proposed sale was formally discussed at an interview which took place on the 16th of July between the Duke, Mr. *Milward* (who was the solicitor of the Duke and also of the trustees of the settlement), and Mr. *Marjoribanks*, one of such trustees, who had full powers from his co-trustee, Lord *Roden*, to act for him in all matters relating to the trusts of the *Blenheim* estates. At this interview Mr. *Marjoribanks* expressed his entire approval, and verbally consented on behalf of himself and his co-trustee to the Duke's proposal to sell the property for £25,000. In the course of the following month the Duke met Mr. *Sartoris* at *Tarasp*, in the *Engadine*, and the terms of the proposed purchase were then arranged between them. The Duke wrote to *Watson* informing him of the arrangement, and on the 21st of August *Watson* wrote to *Sartoris*:—

"The Duke of *Marlborough* informs me that he has settled

with you respecting this (*Northleigh*) property, and that you have agreed to give £25,000, including timber. . . . The title to commence with the same deed as in the matter of *Singe Wood*; the purchase to be completed on the 25th of December next. Shall you wish any notice to be given to the tenants at Michaelmas? Subject to the above, and to the approval of the Duke's trustees, I shall be obliged by your writing me in reply confirming that letter."

In reply to this letter *Sartoris*, on the 12th of September, wrote to *Watson* that he saw nothing now to prevent completion of the purchase.

A formal notice, dated the 25th of August, 1884, was sent by the Duke to the trustees of the settlement and to the solicitors of the trustees, that, being tenant for life under the settlement, in pursuance of the *Settled Land Act*, 1882, he thereby gave them notice that it was his intention, at the expiration of one month from the posting of this notice, to sell to *Charles Sartoris* for the sum of £25,000 the properties (including timber thereon) situate at *Northleigh*, being part of the settled property.

On the 24th of September, 1884, *Sartoris* died.

The representatives of *Sartoris* having declined to complete, on the ground that the provisions of the *Settled Land Act*, 1882, sect. 45, had not been duly complied with, and, consequently, that the Duke, as tenant for life, had no power to make a binding contract, this action was brought by the Duke as sole Plaintiff in the first instance, and, by amendment, with the trustees as co-Plaintiffs, for specific performance. The Plaintiffs, by their statement of claim, submitted that under the circumstances a binding contract for the sale of the property to *Sartoris* was entered into either by the Duke as tenant for life, with the approval of the trustees of the settlement, or by the trustees of the settlement with the consent of the Duke.

*Macnaghten*, Q.C., *Lewin*, and Hon. *A. Lyttelton*, for the Plaintiffs.

*Rigby*, Q.C., *Romer*, Q.C., and *Wiglesworth*, for the Defendants:—

The case put by the statement of claim is in the alternative of

CHITTY, J. 1886 DUKE OF MARLBOROUGH v. SARTORIS.

a contract by tenant for life with the approval of the trustees, or by the trustees with the consent of the tenant for life. It cannot be maintained that the Duke was selling as the agent of the trustees: all that the evidence comes to is that the Duke asked, and that the trustees gave a verbal approval; not that they authorized the Duke to sell, or that the Duke assumed to act on behalf of the trustees. And as the trustees did not previously authorize the Duke to make the contract on their behalf, their subsequent ratification cannot have the effect of making it their contract: *Saunderson* v. *Griffiths* (1). Then as to the statute, the contract purported to be made by the tenant for life under the *Settled Land Act*, and having regard to sect. 45, which requires notice to be given not less than one month "before the making by the tenant for life of the sale, exchange, &c., or of a contract for the same," the Duke as tenant for life, could not contract so as to bind the estate on the 12th of September, when *Sartoris* gave his formal confirmation of the offer. There has been no waiver by the trustees or acceptance by them by writing under their hand of less than one month's notice under sect. 5, subsect. 3 of the *Settled Land Act*, 1884.

[They cited *Wheelwright* v. *Walker* (2); *In re Ray's Settled Estates* (3).]

*Macnaghten*, in reply:—

The power of the trustees to sell at the request and by the direction of the tenant for life is unaffected by the *Settled Land Act*, 1882; such power of sale, either by the tenant for life or by the trustees with his consent, or on his request, or by his direction, having been expressly saved by sect. 56; and the trustees are bound to carry out the contract of the Duke, who has an absolute and overriding power, on the exercise of which no restraint will be imposed: *Thomas* v. *Williams* (4), *Cardigan* v. *Curzon-Howe* (5). The contract for sale is valid and binding, and there has been a sufficient compliance with the requirements as to notice contained in sect. 45, which distinguishes between a contract for sale and a sale.

(1) 5 B. & C. 909.
(2) 23 Ch. D. 752.
(3) 25 Ch. D. 464.
(4) 24 Ch. D. 558.
(5) 30 Ch. D. 531.

CHITTY, J. :—



1886

DUKE OF MARLBOROUGH v. SARTORIS.

The first question raised is, whether there is a contract for sale, the terms of which are sufficiently shewn on the face of the correspondence. Now I have gone through the correspondence carefully, and I can find no objection on the face of the letters. The lands are sufficiently described, either by the letters themselves, or by the map and the particulars which accompanied the letters and formed part of the map. The price is ascertained—£25,000, and the date for completion is ascertained—the 25th of December, 1884, though that is a matter which is only of incidental importance and is not a matter essential to the formation or constitution of a binding contract. At one time there did appear to be a question who were the parties to the contract, but it appears to me there is none. It was argued that the Duke was the contracting party, and that has been accepted. The contract is contained in the correspondence that passed between Mr. *Watson*, who was the agent of the Duke, and Mr. *Sartoris*, and on the face of the letters I think that it was the Duke and the Duke alone who was the contracting party. The trustees of the settlement had given their consent to a sale upon these terms, but they had not given an authority to sell so as to make them the contracting parties, and they are, in my opinion, not the vendors under this contract.

Then it was suggested, rather than argued, with reference to a clause contained in the letter of the 21st of August, 1884, to the effect that the approval of the Duke's trustees was to be obtained, the clause being "subject to the above and to the approval of the Duke's trustees"—that the approval of the trustees was a condition precedent to the existence of any contract: in other words, that there was no contract until that approval was obtained. But that approval, on the evidence, had been obtained at the date of this letter of the 21st of August, 1884, and whether it was intended to have been, or whether in point of law it ought to have been, read as a condition precedent to there being any contract, or a mere condition subsequent to the contract, is quite immaterial, because the actual approval of the trustees, as has been satisfactorily shewn to me by the evidence, had been given previously to the sale. Consequently I have a valid and binding

CHITTY, J. 1886 DUKE OF MARLBOROUGH v. SARTORIS.

contract, to which the Duke is a party as the selling party, and Mr. *Sartoris* is a party as the purchaser, and all the essential terms of the bargain are to be found in the letters themselves.

Then a further question is raised which, to my mind, is more a question of title than a question of contract. I put the case in this way: A man who, apart from the *Settled Land Act* and apart from any powers contained in the settlement, is a mere tenant for life, and has no right to sell the estate, contracts to sell the fee simple. As the matter stands at the date of the date of the contract he has only a life estate, but there is nothing which precludes him from getting the control of the fee simple of the estate—either getting it into his power himself, or getting the person in whose power it is to concur with him—and conveying it to the purchaser, provided he does that within the time limited for the completion. The Court of Chancery has even granted a further time in cases where there has been any difficulty as to time; but the contract itself is good. It is a contract upon which he could be sued, and it is a contract upon which he could himself sue for specific performance, of course, not in the result getting a decree or judgment for specific performance unless he can make a title, which is a condition implied in all sales of real estate.

A large portion of the argument for the Defendant appeared to me to be based upon a fallacy, namely, that in order to constitute a binding contract as to land, between vendor and purchaser, the contract should, the moment it is made, bind the fee simple of the land; but I regard this question and the question which I am about to mention as a question of title rather than a question of contract. The Duke is the tenant for life under a settlement which contains a power of sale vested in the trustees and exercisable at the request and by the direction in writing of the Duke. The Duke has obtained the verbal consent of the trustees to the sale, having made a request to them at a meeting which took place in July, previously to the contract, and he made the request which in substance is the request required by the power, except that this request was not in writing. I see no reason why the day after the contract had been entered into he could not make a request to the trustees in writing formally.

There is no question that it is a case in which the trustees would have been bound to comply with that request thus made. The mere formality of writing, I take it, was a ceremony which could be done at any time. The trustees come forward now as Plaintiffs in the action, and from beginning to end they have had no objection to giving effect to the sale in any proper manner. I am not sure whether any such request in writing has hitherto been made, but if it has not been made, I see no reason why, on the making of the title, the request in writing should not be made at this time.

But there is a further point, which is a very important point, on the *Settled Land Act*. The purchaser says in order that the Duke should be able to put into force the extensive powers which are conferred upon him as tenant for life by the Act, it is necessary as a condition precedent that before he entered into the contract he should have given the notice required by the 45th section. Now, the substance of sect. 45, which comes under what may be termed the 10th chapter of the Act relating to trustees, is, that one month's notice is to be given to the trustees and to the solicitor of the trustees of any such intention; and the section ends with "one month before the making by the tenant for life of the sale, exchange, partition, lease, mortgage or charge, or of a contract for the same." And there is a material enactment found in the 3rd sub-section of the same section to the effect that a person dealing in good faith with the tenant for life is not concerned to inquire respecting the giving of any such notice as is required by the section. The point is this, whether the contract for sale which the tenant for life enters into is a good contract within the Act unless the notice has been given one month previously. Now, on the reading of the section it is quite plain that a distinction is drawn between the making of the sale and the making of a contract for sale; and if the notice therefore required by the section is given before either one of those two things—assuming that they are two things, then the notice will be good. The notice in this case was given on the 25th of August; and the purchaser died just before the expiration of the month.

Now the language points to a distinction between the making

CHITTY, J. 1886 DUKE OF MARLBOROUGH v. SARTORIS.

of the sale and the contract, and having gone through the Act, it appears to me that such a distinction is intended to be drawn, and that the terms used are not mere alternative terms. I observe in the words "making of the sale" the word "making" is not confined to the making of the sale; but it is the making of an exchange, the making of a partition, the making of a lease, the making of a mortgage, or the making of a charge; and though in general legal language I should say that there was little or no distinction between a contract for sale of realty and the sale of the realty, yet I certainly should say that there is a distinction between a contract, taking one of the other subject matters, for a lease and a lease.

Turning to the other sections of the Act for the purpose of ascertaining whether it is intended to place this fetter on the power of the tenant for life to make a sale: sect. 3 enacts that a tenant for life may sell the settled land. In sect. 4 certain regulations are enacted respecting the sale, and respecting also enfranchisement, exchange, and partition, enfranchisement being under this Act effected by means of sale; and there is a regulation that every sale shall be made at the best price that can reasonably be obtained. Then again in sect. 17 the language used is, the making of a sale, and the other matters which are mentioned. By sect. 20 there is vested in the tenant for life a power to make a conveyance which will operate for the purpose of giving effect to the sale or the other transactions which are mentioned in the clause—it is a statutory power of conveying property which is not vested in himself. There the words are "On a sale, exchange, partition, lease, mortgage, or charge, the tenant for life may as regards the land sold" and so forth, exercise the power. Sect. 31, which has an important bearing on the question for decision, enacts that "a tenant for life may contract to make any sale, exchange, partition, mortgage, or charge;" and there, again, there is a distinction in point of language between the contract and the sale. The 2nd sub-section contains this provision, that "every contract shall be binding on and shall enure for the benefit of the settled land, and shall be enforceable against and by every successor in title for the time being of the tenant for life, and may be carried into effect by any such successor."

There is the carrying into effect of a contract which appears again to me to point to something done subsequently to the contract as being the sale. Then the same sub-section goes on to enact that the contract shall be carried into effect, "so that it may be varied or rescinded by any such successor, in the like case and manner, if any, as if it had been made by himself."

The result, therefore, is, that *primâ facie* the contract of the tenant for life binds the land, and, if I may use the expression, runs with and against the land, but not absolutely, because it is left in the power of the tenant for life who makes it, and of the tenant who succeeds him, to vary or rescind that contract, which, as I have said, is only made *primâ facie* binding on the inheritance. In other words, the contract is not made absolute and unalterable, but it is a contract that may be varied by the tenant for life and his successor.

Then I am brought to sect. 45, and it seems to me that all that I have read in the previous part of the Act points to this distinction, which really is the question for decision. I think that this 45th section does intend to draw a distinction between the making of the sale and the contract. There is no fetter placed on the power of the tenant for life to contract in sect. 31, and there is no hint given of any such fetter. I see no reason why, merely to enable a purchaser to escape from an honest contract, I should, if I may say so, invent a fetter which would prevent the tenant for life from dealing with the land. Of course I am only considering the case of good faith. Turning to the 3rd sub-section of the 45th section which I have already mentioned, I find it enacted that the purchaser—because that is the "person" to whom I must refer in the present case—is not concerned to inquire whether the notice has been given or not. It seems to me, therefore, that the giving of the notice is a matter between the tenant for life and the trustees, and one with which the purchaser is not concerned. He could not expect to have the notice set out in his abstract if he inquired whether the notice was given. I can see no reason why the vendor should not say: "That is a matter with which you are not concerned, for the Act says so in so many words." Of course the case is different where

CHITTY, J. 1886 DUKE OF MARLBOROUGH v. SARTORIS.

there are no trustees of the settlement, who are trustees within the Act for the purposes of the Act, in which case an order has to be made appointing trustees for the purposes of the Act. The purchaser of the property would be entitled to some explanation in a case where the trustees had been appointed, I will say the day before the contract, but even if that be so, although it is not necessary to express any decided opinion upon it, it does not prevent the notice operating so as to be an effectual and good notice before the time has arrived for completion. And that is the case before me, because the day of completion of this contract is the 25th of December, and the notice which was given on the 28th of August had run out long before the time limited for completion.

I may also observe that in the 53rd section the tenant for life in exercising the powers of the Act is to be deemed in substance to be in the position of a trustee; but the 54th section enacts that "On a sale, exchange, partition, lease, mortgage, or charge, a purchaser, lessee, mortgagee, or other person dealing in good faith with a tenant for life shall, as against all parties entitled under the settlement be conclusively taken to have given the best price, consideration, or rent, as the case may require, that could reasonably be obtained by the tenant for life, and to have complied with all the requisitions of this Act."

I think, for the reasons which I have given, that the contract which the Duke entered into is a good contract within the Act made by a tenant for life, although the notice given to the trustees did not expire until after the contract was constituted by the formal acceptance by the purchaser.

One word more on the point with reference to the contract. Sect. 56 which makes any powers vested in the trustees and the powers of the tenant for life cumulative, and contains provisions for cases where there may be a conflict, also has this expression: "whereof the tenant for life exercises, or contracts, or intends to exercise any power." That also appears to me to point to this, that the sale is something distinct from the contract. This distinction which I have drawn is not absolutely new, because there is a mode of conveyance known to the law called a bargain and sale. That, however, is a matter upon which, though I mention

it, I do not rely as forming any part really of the basis of my judgment.

Judgment for specific performance with costs.

Solicitors: *Spencer Whitehead*, agent for *Milward & Co., Birmingham; Markby, Stewart & Co.*

F. G. A. W.

---

## LORING *v.* DAVIS.



[1885 L. 103.]

*Sale of Shares—Principal and Agent—Custom of Stock Exchange—Indemnity.*

*A.* having instructed his brokers, *B. & Co.*, to purchase shares in the *O. Bank*, received from them a bought-note stating the purchase of shares from *C.* (a jobber), but, according to the usual practice on the *Stock Exchange*, not specifying the registered numbers of the purchased shares.

Between the date of purchase and the settling-day the bank stopped payment and proceedings were taken to wind it up. *A.'s* solicitors thereupon wrote to *B. & Co.* repudiating the contract for purchase contained in the bought-note, on the ground that the contract was illegal and void, being in contravention of 30 Vict. c. 29, and giving notice that if they completed it it would be at their own risk. On the same day *A.* wrote a private letter to *B.* calling attention to the formal letter, "and I wish you clearly to understand that whatever position you may have to assume with regard to them (the shares) I consider myself fully bound to support you."

The name of *A.*, as the purchaser of the shares, was returned to *C.* by *B. & Co.*, and on receiving a transfer and the share certificates the money was paid by them to the transferor's brokers. *A.* refused to execute the transfer, and returned it to *B. & Co.*, in whose possession it remained, without, for some time, any intimation to the vendor that *A.* repudiated the transaction:—

*Held*, that as the liability of *C.* (the jobber) in respect of the shares had ceased on the acceptance of the transfer by *B. & Co.* (*Coles* v. *Bristowe* (1)); it followed that *A.*, though he had not executed the transfer, had in the circumstances, and by not definitely repudiating the authority given to *B. & Co.* as his agents, become equitable owner of the shares, and bound to indemnify the vendor against all loss and liability in respect of them.

ON the 28th of April, 1884, the Plaintiff, through her brokers, *Pember & Boyle*, sold on the *Stock Exchange* thirty shares in the *Oriental Bank Corporation* to *Ferguson & Clark*, who were jobbers, for £193 17*s.* 6*d.*

(1) Law Rep. 4 Ch. 3.

CHITTY, J.
1886
LORING
v.
DAVIS.

On the 30th of April, 1884, the Defendant, *Thomas Davis*, instructed his brokers, *Scrutton & Son*, who had been added as Defendants by amendment, to purchase shares in the *Oriental Bank Corporation*. On the same day the following bought-note was forwarded by *Scrutton & Son* to *Davis*, who accepted and retained the same.

"Subject to the Rules of the *London Stock Exchange*.

"No. 4285. "81, *Old Broad Street, London*,
"30th April, 1884.

"*Scrutton & Son*,
"Stock and Share Brokers,
"Bought for *T. Davis*, Esq.,

| | £ | s. | d. |
|---|---|---|---|
| "10 *Oriental Bank* shares at 5½ per share . | 55 | 0 | 0 |
| "Stamp and fee . . . . . | 0 | 10 | 0 |
| "Commission . . . . . | 0 | 10 | 0 |
| "£56 | 0 | 0 | |

"Of *Ferguson & Co.*,
"For 14th May /84.
"*Scrutton & Son*, Brokers."

On the 2nd of May, 1884, the *Oriental Bank* stopped payment, and on the following day a petition was presented, on which a winding-up order was made.

On the 12th of May *Robins, Cameron, & Kemm*, solicitors for *Thomas Davis*, wrote to *Scrutton & Co.*, by his instructions, the following letter:—

"On behalf of Mr. *Thomas Davis* we beg to give you notice that he repudiates the contract for the purchase of the *Oriental Bank* shares contained in your bought-note of 30th April, 1884, on the ground that such contract is illegal and void, being in contravention of the Act 30 & 31 Vict. c. 29. And we further give you notice that if you complete the same you will do so at your own risk, and that Mr. *Davis* requests that you will not give his name to the selling broker or jobber, and will not in any way act on his behalf under or in pursuance of the said contract."

On the same day *Davis* wrote to *Scrutton*, of whom he was a connection by marriage:—

"Dear *James*,—Messrs. *Robins, Cameron, & Kemm* will send

you a formal letter respecting the *Oriental Bank* shares, but although this step may be desirable both in your and my interest, I hesitated much about sanctioning it, and wish you clearly to understand that whatever position you may have to assume with regard to them I consider myself fully bound to support you."

On the 14th of May, a buyer's ticket with the name of *Davis* as the purchaser of ten shares was sent by *Scrutton & Son* to *Ferguson & Clark*, and by them furnished to the Plaintiff's brokers, *Pember & Boyle*; and on the 21st a transfer to *Davis* as transferee of the ten shares, described by their numbers, duly executed by the Plaintiff, was sent by *Pember & Boyle* to *Scrutton & Son*, with the share certificates and the buyer's ticket. In return for this transfer *Scrutton & Son*, on the 23rd of May sent to *Pember & Boyle* a cheque for £55 10*s.*, the price of the ten shares, and forwarded the transfer to *Davis* for his execution. *Davis* refused to execute, on the ground that the contract was illegal and void, being in contravention of *Leeman's Act* (30 Vict. c. 29), and returned the transfer to *Scrutton & Son*, in whose possession it had since remained.

It appeared that on the 3rd of June *Davis* paid to *Scrutton & Son* the £55 10*s.*, and subsequently a further sum of 7*s.* 6*d.*, "in order," as he stated in his evidence, "to indemnify them for the payment which by the rules of the *Stock Exchange* they had been compelled to make."

No intimation that *Davis* repudiated the purchase was given to the Plaintiff by *Scrutton & Son* until the 10th of June at the earliest.

The action was brought by the Plaintiff against *Davis* and, by amendment, against *Scrutton & Son*, claiming a declaration that she was a trustee of the ten shares for *Davis*, and that *Davis*, or, alternatively, *Scrutton & Son*, might be ordered to indemnify her against all calls and all liability and loss on or in respect of the said shares.

In his evidence given in Court *Davis* stated that he had no knowledge whatever of the practice or customs of the *Stock Exchange*, and that he was not aware of any custom to treat as binding and valid contracts for sale and purchase of shares which did not comply with the provisions of *Leeman's Act*.

CHITTY, J.

1886

LORING v. DAVIS.

*Macnaghten*, Q.C., and *Haldane*, for Plaintiff:—

The authority given by *Davis* to *Scrutton & Son* to purchase and accept a transfer of shares was never revoked. The private letter of the 12th of May being altogether ambiguous, it was not competent to *Davis* afterwards to repudiate as unauthorized what was done by *Scrutton & Son* on the interpretation of that letter, which was *bonâ fide* adopted by them, and of which it was equally capable with that now contended for by *Davis*: *Ireland* v. *Livingstone* (1). Nor can *Davis*, having, as principal, employed *Scrutton & Son* as his agents to do an act involving legal liability, draw back and leave them to bear that liability: *Read* v. *Anderson* (2). It is absolutely immaterial whether the transferee of shares executes the transfer or not. As the authorized agents of *Davis*, *Scrutton & Son* completed the contract by giving in his name as purchaser of the shares, paying the purchase-money, and accepting the transfer, which was not returned to the Plaintiff, but remained in their possession, not on their own account, but as agents of *Davis*. And thereby, in accordance with the rules and usages of the *Stock Exchange*, *Davis* became substituted for *Scrutton & Son* as the purchaser of the shares, and under the same liability to the Plaintiff as if he had taken the transfer himself: *Coles* v. *Bristowe* (3); *Shaw* v. *Fisher* (4); *Bowring* v. *Shepherd* (5).

*T. E. Scrutton*, for *Davis*:—

The transaction of the 30th of April admittedly did not comply with the provisions of 30 Vict. c. 29, and there is therefore no valid or effectual contract for the sale of the ten shares, and no action to enforce it will lie: *Nelson-Mitchell* v. *City of Glasgow Bank* (6). It is said that by the usage of the *London Stock Exchange* contracts which do not follow the requirements of that Act are recognised, and will be enforced. But unless, as was the case in *Read* v. *Anderson* (7) and *Seymour* v. *Bridge* (8), the

(1) Law Rep. 5 H. L. 395.
(2) 13 Q. B. D. 779.
(3) Law Rep. 4 Ch. 3.
(4) 5 D. M. & G. 596.
(5) Law Rep. 6 Q. B. 309.
(6) 6 Court Sess. Cas. 4th Ser. 420; 4 App. Cas. 624, 630.
(7) 13 Q. B. D. 779.
(8) 14 Q. B. D. 460.

Defendant can be shewn to have had knowledge of such usage, it is not binding, and cannot be enforced against him; as a person buying, or giving an order to his broker to buy, on the *Stock Exchange* is only bound by customs which are legal: *Neilson* v. *James* (1); *Perry* v. *Barnett* (2). If there was no valid contract *ab initio* there can be no novation; and here any authority on the part of *Scrutton & Son* to accept the transfer on his behalf was distinctly repudiated by *Davis*, who, if aware of the provisions of the Act, was justified in repudiating a contract which from non-compliance with the Act was illegal. All that was intended by the private letter of the 12th of May was that *Davis* would stand by *Scrutton*, and would not suffer him to be exposed to loss in consequence of the rules of the *Stock Exchange*.

*Crossley*, Q.C., and *Hornell*, for *Scrutton & Son*, took no part in the argument.

*Macnaghten*, in reply.

CHITTY, J.:—

There are three questions in this case as it appears to me, two of fact, and one of law. The first question of fact is whether Messrs. *Scrutton & Son* had authority from *Davis* to accept the transfer; the second whether they did accept the transfer; and the third is what is the legal effect of the transfer having been accepted.

With regard to the facts there is very little controversy between the parties. Quite apart from *Leeman's Act* (30 Vict. c. 29), there is no pretence for saying there was any contract between the Plaintiff and the Defendant *Davis*. A contract by *A.* to sell to *B.*, and a contract by *B.* to sell the same thing, or a portion of the same thing, to *C.*, creates no liability as between *A.* and *C.*; that is plain enough. Therefore upon these facts alone the Defendant *Davis* is not liable. But the Plaintiff does not rest her case upon these facts; she rests her case upon the transaction which relates to the transfer. Before the settling-day (14th of May) had arrived, a petition was presented to wind up the

(1) 9 Q. B. D. 546. (2) 15 Q. B. D. 388.

CHITTY, J. 1886 LORING v. DAVIS.

*Oriental Bank Corporation*, and of that circumstance *Davis* became aware. Thereupon he consulted his solicitors, and appears to have received from them advice to the effect that inasmuch as the specific numbers of the shares had not been mentioned in the contract of purchase the contract was void. Now in these circumstances I will assume, notwithstanding that *Scrutton & Son*, the brokers, had come under some liability as members of the *Stock Exchange* in regard to what they had already done on the instructions of Mr. *Davis*, that Mr. *Davis* was entitled to revoke the authority. On the 12th of May, *Davis's* solicitors wrote to *Scrutton & Son*, the brokers, a letter which states that they sent therewith formal notice of repudiation of the contract, and that the purchase had come to an end; and this formal letter is as specific as it can be. [His Lordship after reading the letter of the 12th of May, proceeded:—] It is not merely a notice of repudiation but a notice going on to give a specific direction not to complete, and intimating in plain terms that if those things are done, and if the brokers act in any way on behalf of *Davis* it will be at their own risk. If the matter had stood there, I consider there would have been an end of Messrs. *Scrutton's* authority. But *Davis* was not content to leave his brokers to act, in a position which is acknowledged to be one of some difficulty, on that formal letter alone, and he on the same day sent a letter [which his Lordship read].

The question, then, is, what is the effect of this private letter of the 12th of May. It might mean this:—"I consider that in some way through me you have got into a position of difficulty, and I will indemnify you" or it may mean that "I have sent you a formal letter revoking the authority. That is a letter you can make use of. This is a private letter to you in a friendly manner, and I tell you that though I have sent that formal letter revoking the authority, I will leave you at liberty to act and to continue to be my agent in this transaction notwithstanding that." Now it appears to me that the language used is not that of a man who merely meant to say "I will indemnify you," because that would have been very easy to express.

I think the meaning is, that notwithstanding "the formal letter" you may continue to act as my agent whatever position

you may have to assume. It is, I think, intended to be on the face of it a letter controlling the formal letter, and to contain the substance of the directions upon which the agent was to act. Instead of saying "I will indemnify you," the letter goes on, "I consider myself fully bound to support you." I think that means, "I will really leave the matter in your hands. If you like to act on this formal letter you may. If on the other hand you choose, for reasons which may seem good to you, to continue to act as if you were my agent, then I will support you in that position which I leave you to say whether you will assume or not." As between the principal and agent, if the instructions are ambiguous the principal cannot turn round on the agent and say that the meaning of the instructions was different. Lord *Chelmsford* in *Ireland* v. *Livingston* (1) well expressed the law upon that subject: "Now it appears to me that if a principal gives an order to an agent in such uncertain terms as to be susceptible of two different meanings, and the agent *bonâ fide* adopts one of them and acts upon it, it is not competent to the principal to repudiate that act as unauthorized because he meant the order to be read in the other sense of which it is equally capable. It is a fair answer to such an attempt to disown the agent's authority, to tell the principal that the departure from his intention was occasioned by his own fault, and that he should have given his order in clear and unambiguous terms." I read that as containing a proposition applicable to the case if the private letter is susceptible of two meanings. I think that the agents, Messrs. *Scrutton & Son*, who were not called as witnesses, adopted the construction which I have mentioned. The result is, therefore, that I hold that the authority of the agent was not revoked.

Then did the agents in fact accept the transfer? I think they did notwithstanding the formal letter of the 12th of May. They sent to the jobber, who transmitted it in the usual way to the Plaintiff's brokers, the ticket containing the number of the shares, and the name of the transferee, *Thomas Davis*, for the purpose of course of that being inserted in the transfer as the transferee's name. A sum of £55 is mentioned and 7*s.* 6*d.* stamps on the deed, and at the foot is their name, "*Scrutton & Son*, 81, *Old*

(1) Law Rep. 5 H. L. 416.

CHITTY, J. 1886 LORING v. DAVIS.

*Broad St.*, pay:" the meaning of which was that they would pay the money. Upon that the Plaintiff's brokers made out the transfer. Now the transfer is free of all contention. It is executed by the Plaintiff and contains the specific numbers of the ten shares. That transfer was sent by Plaintiff's brokers to *Scrutton & Son*, who in exchange for the transfer paid the amount according to the ticket, and the transfer remained in their possession from that day until it has been produced in Court. Then comes the question whether there was an acceptance by *Davis'* authorized agents of a transfer on his behalf.

Now what was the position of *Scrutton & Son* under the rules of the *Stock Exchange*. They were alone, according to the rules of the *Stock Exchange*, which only recognises its own members, liable to pay the amount of the price. Rule 90 is to the well-known effect: "The buyer who takes up securities deliverable by deed of transfer, shall before 12 o'clock on the ticket-day issue a ticket with his own name as payer of the purchase-money" —that was done—"which ticket shall contain the amount to be transferred," and other matters. Then rule 99 is to the effect that "the deliverer of shares or stock who shall not receive a ticket by 2·30 on the ticket-day may sell out such securities by 3 o'clock."

In substance, without going through the rest of the rule, I may state the effect to be this, that the seller had the right to sell out the shares in question, and of course in the circumstances in which the bank stood on the 15th of May he would not have been able to sell at anything like the price which had been obtained previously. He would have been entitled to sell them, and it may be he would have been entitled to sell although instead of keeping any of the purchase-money he had to pay money to the transferee to obtain a transfer. *Scrutton & Son* would be bound according to these rules to pay the amount that would have to be paid to obtain the transfer. In these circumstances it seems to me what *Scrutton & Son* intended to do, and what they did by accepting and by keeping the transfer, which they were under no obligation to do; they giving no information whatever to the Plaintiff and the Plaintiff's brokers that the transfer was not carried out; by letting them for a very con-

siderable period—until at least the 10th of June—remain in the belief that the transfer was accepted, was to accept the transfer, and to accept it on behalf of the Defendant *Davis*. They did not, according to the evidence, even on the 10th of June repudiate or give any intimation that they repudiated the transaction. Taking the transfer as they did, and keeping it, which they were under no obligation to do, without the slightest intimation to the Plaintiff or the Plaintiff's brokers, I must hold as a fact that they accepted the transfer on behalf of *Davis*.

Then comes the question as to the legal effect of accepting a transfer. Now the transfer was not executed by the Defendant *Davis*. There is direct authority on the point. *Coles* v. *Bristowe* (1) involved directly the question of the jobber's liability, but the jobber could not be made liable unless some other person had come under a liability towards the Plaintiff. The Court of Appeal held that the jobber had been relieved of the liability which fell upon him by reason of his original contract to purchase, and that the liability which otherwise would have remained upon him was imposed in the circumstances of the case on the transferees, none of whom had executed the transfer. The Court of Appeal could not have held, and did not hold, that the jobber was relieved, unless some other person had become liable. Though the exact decision was that the jobber was not liable, the decision involves the proposition that the transferees were. Lord *Cairns* says (2): "In these circumstances, the good faith of the transaction being in no way impugned, but being rather recognised by the plaintiff, we are of opinion that the proper conclusion to draw is, that the whole 200 shares and the transfers of them were duly accepted and paid for by the transferees, and that these transferees were in equity as much bound as if they had executed the deeds." Now the only ground on which the transferees were liable was by accepting the transfers, because they were not original parties to the contract with the Plaintiffs. Then a little later in his judgment Lord *Cairns* (3) quoted with approval Lord *Cranworth's* observations in *Shaw* v. *Fisher* (4): "The plaintiff cannot make a title to these shares

(1) Law Rep. 4 Ch. 3.
(2) Ibid. 9.
(3) Law Rep. 4 Ch. 12.
(4) 5 D. M. & G. 608.

CHITTY, J. 1886 LORING v. DAVIS.

to Mr. *Fisher*, because he has already assigned them to Mr. *Carmichael*. Then it is said Mr. *Carmichael* has not completed. What does that signify? As far as Mr. *Shaw* is concerned he has executed the deed, and there is nothing to prevent Mr. *Carmichael* at any time coming with that deed and registering it. Therefore it is plain the plaintiff cannot now make a title." I put a simple case. If a man makes a transfer, there being no previous contract whatever, and executes a transfer to another of shares or stock, on the face of the transfer it is a sale, and if the intended transferee pays the purchase-money upon the transfers, and takes the transfer into his own possession and keeps it, has not the transferee by thus accepting the transfer of the shares, as between himself and the transferor become the equitable owner of the shares, and that notwithstanding that the transferee does not execute the transfer? I say, adopting Lord *Cairns'* view, that *Davis* has become equitable owner of the shares, and therefore it follows that as equitable owner of the shares he is bound to indemnify the person who legally holds the shares for him as the only and absolute *cestui que trust*. The result, therefore, is that I decide the three points in favour of the Plaintiff.

Judgment as in *Evans* v. *Wood* (1). *Davis* to pay the Plaintiff's costs and also the costs of *Scrutton & Son*.

Solicitors: *Barnard & Co.*; *Robins, Cameron & Kemm*; *Merriman, Pike & Merriman*.

(1) Seton, 4th Ed. p. 1378.

F. G. A. W.

## BISSETT *v.* JONES.

CHITTY, J.

1886

*May* 21, 22, 25.

[1886 B. 1422.]

*Practice—Mortgage—Action to enforce Mortgage Security—Claim for Account and Foreclosure or Sale—Claim for Sum due for Principal and Interest under Covenant in Mortgage Deed—Joinder of Claims—Foreclosure Judgment Nisi—Rules of Supreme Court*, 1883, *Order* III., *r.* 6; *Order* XIII., *rr.* 3, 6, 7; *Order* XV.

A writ was indorsed with a claim for an account of principal, interest, and costs on a mortgage security, and for foreclosure or sale, and also with a claim for a specific sum for principal and interest due under a covenant in the mortgage deed.

The Defendant did not appear, and no statement of claim was delivered.

The Plaintiff moved, under Order XIII., rule 3, for liberty to forthwith sign final judgment for the amount indorsed on the writ, and under Order XV. for the usual foreclosure judgment *nisi*:—

*Held*, that under Order XIII., rule 3, the Plaintiff was entitled to sign judgment for the liquidated demand notwithstanding that the writ was also indorsed with a claim for an account and foreclosure, but that he was not entitled under Order XV. to a foreclosure judgment.

Observations on *Blake* v. *Harvey* (1).

## MOTION.

The writ in this action, which was an action by a mortgagee to enforce his security, was issued on the 1st of April, 1886, and was indorsed with a claim for an account of principal, interest, and costs on a certain mortgage security, and for foreclosure or sale, and also with a claim for the sum of £225 10*s.* for principal and interest due under a covenant in the mortgage deed.

The Defendant not having appeared, and no statement of claim having been delivered, the Plaintiff now moved under Order XIII., rule 3, of the Rules of Supreme Court, 1883, for liberty to forthwith sign final judgment for the amount indorsed on the writ with interest up to judgment, and costs, and, under Order XV., for the usual foreclosure judgment *nisi*.

It appeared that the Plaintiff's application to sign judgment had been refused in the Central Office on the ground that Order XIII., rule 3, only applied where the writ was indorsed

(1) 29 Ch. D. 827.

CHITTY, J. 1886 BISSETT v. JONES.

under Order III., rule 6, with a claim for the liquidated demand only.

*B. Fossett Lock*, for the motion :—

With regard to the first part of the motion the Plaintiff relies on Order XIII., rule 3, which provides that where the writ is indorsed for a liquidated demand, whether specially or otherwise, and the Defendant fails to appear thereto, the Plaintiff may enter final judgment for any sum not exceeding the sum indorsed on the writ, together with interest. This writ is not specially indorsed, but I submit that the words "or otherwise" in the order extends the practice to cases other than those of writs specially indorsed. These words appear for the first time in the Rules of 1883. Order XIII., r. 3, of the Rules of 1875, was no doubt confined to specially indorsed writs. Final judgment may be had for a portion of the claim only. For instance, rule 7 of Order XIII., provides that where the writ is indorsed with a claim for damages and is further indorsed for a liquidated demand, whether specially or otherwise, and the Defendant fail to appear, the Plaintiff may enter final judgment for the liquidated demand and interlocutory judgment for the damages. It is submitted that the objection taken by the Master cannot be sustained.

In *Smith* v. *Davies* (1) your Lordship decided that a foreclosure judgment might be obtained under Order XV.

[CHITTY, J. :—The observations of Lord Justice *Cotton* in *Blake* v. *Harvey* (2) have thrown doubt on *Smith* v. *Davies*, and in deference to those observations I am not disposed in the present case to make a foreclosure order under Order XV.]

CHITTY, J. :—

I see no difficulty in making an order under Order XIII., r. 3, and I think that so far the application should be acceded to. That order enables judgment to be entered for a liquidated demand, whether the writ be specially indorsed under Order III., r. 6, or not, in that respect enlarging the provisions of the Rules of 1875. The object of the present action is to recover the debt

(1) 28 Ch. D. 650. (2) 29 Ch. D. 827.

under the covenant, and the Plaintiff also seeks for the ordinary Chancery remedies of a mortgagee.

Before the *Judicature Acts* the Plaintiff would have had to institute separate proceedings. He would have had to bring an action at law on the covenant, and to file a bill in Chancery for foreclosure. Since the *Judicature Acts*, one proceeding alone is necessary, and now claims on the covenant and for foreclosure can be combined in a single action. The judgment which a mortgagee who combines his claims is entitled to has been settled by the Court of Appeal in *Farrer* v. *Lacy, Hartland & Co.* (1), and the judgment on the covenant is the same both in the Chancery and Queen's Bench Divisions. It appears to have been considered in the Master's Office that judgment could not be entered up because the writ was indorsed for two claims. It is, of course, clear that the Plaintiff could not have signed judgment for foreclosure. He must have come to the Court or Judge on that part of his claim. It was, therefore, considered in the office that the claims could not be severed. It also, perhaps, was thought that rule 3 of Order XIII. was limited to writs indorsed with a claim for a liquidated demand only, because that rule was followed or accompanied by another, namely, rule 7 of the same order, which makes special provision for the case of writs indorsed with a claim for pecuniary damages and for a liquidated demand. But I do not think that the express provision contained in rule 7 impliedly operates by way of limitation to rule 3, for both are affirmative rules. I therefore think that the application is properly made under rule 3, of Order XIII., and I also think that any difficulty as to the result of so holding with regard to two distinct judgments possibly being made on one writ, is well answered by shewing that rule 7 of Order XIII. admits the possibility of two distinct judgments being entered. However, no mischief or inconvenience can arise from acceding to the application. On the contrary, to hold otherwise would be inconvenient, for it might force the Plaintiff to take out two writs, as it is still competent for him to do; to hold that the Plaintiff can obtain judgment on one writ is not detrimental to the Defendant, for there is a saving of expense. I therefore

(1) 31 Ch. D. 42.

CHITTY, J.
1886
BISSETT
v.
JONES.

make the order as asked on that part of the motion which is brought under rule 3 of Order XIII. I have, however, to add that my judgment strictly relates to the case before me, namely, that of a mortgagee joining in one action a claim for foreclosure with a claim under the mortgage covenant, and that my present judgment is confined to that class of cases. With respect to that part of the motion which is under Order XV., I have already said that my present intention is not to act upon *Smith* v. *Davies* (1). It is, however, quite possible that in some similar application I may make an order under Order XV. with a view of having the question raised and settled in the Court of Appeal.

To have taken such a course in the present case would not have been proper, seeing that no one appears for the Defendant, and the case could not be argued.

The judgment will include only the costs in an action on the covenant, following the rule in *Farrer* v. *Lacy, Hartland & Co.* (2).

Solicitors: *T. H. Hiscott.*

(1) 28 Ch. D. 650.

(2) 31 Ch. D. 42.

G. M.

NORTH, J.
1886
May 27.

## *In re* TILLETT.
## FIELD *v.* LYDALL.

[1874 T. 82.]

*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 24, *sub-s.* 7 [*Revised Ed. Statutes vol. xvii. p.* 77]—*Jurisdiction—Administration Action.*

The solicitor to the Plaintiff in a creditor's action bought up debts; the estate was insolvent:—

*Held*, that the question whether the solicitor was trustee for the creditors of any profit on the purchase could not be raised by the certificate of the Chief Clerk, in the absence of any direction on the subject in the order under which the certificate was made.

THIS was a creditor's action for the administration of the estate of *Abel Tillett*, deceased. The Defendants were the executors of the deceased. The estate turned out to be insufficient. The common administration decree was made on the 27th of July, 1874. Among the secured creditors of the deceased were *Eliza Ann Barber* for a sum of £900 and interest, and Messrs. *Gurney* for a sum of £3000 and interest. *William Henry Tillett*, solicitor of the Plaintiff in the action, in March, 1877, bought the debt of *Eliza Ann Barber* for a sum of £700, and in July, 1877, he bought the debt of Messrs. *Gurney* in consideration of a sum of £1600, and a covenant to increase the consideration in certain events.

The Chief Clerk made his certificate, dated the 25th of March, 1886, allowing by reference to the first part of the first schedule to his certificate a number of debts, including those of *Eliza Ann Barber* and Messrs. *Gurney*, with interest. The certificate found that "the said *William Henry Tillett* is the solicitor appearing in this action for the Plaintiff, and under the circumstances herein appearing he is a trustee for the benefit of the creditors of the testator, *Abel Tillett*, deceased, in respect of the sums (if any) received or to be received by the said *William Henry Tillett* in excess of the sum paid to the said Mrs. *Eliza Ann Barber* and Messrs. *Gurney & Co.* for the purchase of the said debts, as appears in the indentures of the 6th of March, 1877, and the 5th of July, 1877, with interest thereon, and all proper costs and

NORTH, J. 1886 *In re* TILLETT. FIELD *v.* LYDALL.

expenses." Against the entry of the debt of *Eliza Ann Barber*, as a debt allowed, there was the following note by the Chief Clerk: "By indenture dated the 6th of March, 1877, this debt was assigned to Mr. *W. H. Tillett*, as stated in answer to account No. 1, and the said *W. H. Tillett* is entitled to a dividend on the amount due to the said *E. A. Barber* until, with the realisation of his securities, the purchase-money of £700 paid by him and interest at £5 per cent. has been repaid to him." There was a similar note, *mutatis mutandis*, against the entry of the debt of Messrs. *Gurney*.

This was a summons on the part of *William Henry Tillett* to vary the Chief Clerk's certificate by striking out the passages limiting his right to receive more than the sums he had actually paid and interest.

There were complicated accounts requiring adjustment in the action between *William Henry Tillett* and the estate of *Abel Tillett*, and under an order dated February, 1875, *W. H. Tillett* had liberty to attend the proceedings in the matter and cause.

*Cozens-Hardy*, Q.C., and *Chadwyck Healey*, for the summons:—

In the first place, there is no jurisdiction in this action to determine whether the applicant is a trustee for the general creditors. If he is to be made a trustee he can only be done so upon formal pleadings in an action for the purpose.

*Napier Higgins*, Q.C., and *Freeman*, for the Defendants in the action, the executors of the testator:—

There is jurisdiction under the *Judicature Act*, 1873, sect. 24, sub-sect. 7, to determine such a matter as this in controversy between the parties. *William Henry Tillett* having liberty to attend is party to the action under the definition contained in the interpretation clause, sect. 100, of the *Judicature Act*, 1873.

*Micklem*, for the Plaintiff.

NORTH, J.:—

I think that this is a case I cannot now deal with, and that if the Applicant thinks fit to insist upon having the matter decided

elsewhere he is entitled so to do. [His Lordship stated the facts, and proceeded:—]

Now it appears to me that this matter was not open for decision by the certificate, in the absence of any direction upon the subject in the order directing the inquiries and accounts. It may be that there is some equitable right against *William Henry Tillett* by reason of his having acquired those debts under the circumstances indicated—for the purpose of this decision it may be assumed that there is such right. But it seems to me a matter which cannot be dealt with in the mode adopted by the Chief Clerk. The question is one between *W. H. Tillett* and the other creditors of the testator, and does not affect the testator's estate. It is an equity subsisting between the parties, which any one of them has a right to say should, if dealt with at all, be decided in a formal way. I think that, as the objection is taken and persisted in, the question raised can only be decided properly in a separate proceeding; and that the Applicant is entitled, since he insists upon it, to have this certificate varied as asked.

Solicitors: *Flux & Leadbitter*, agents for *W. H. Tillett & Co.*, *Norwich; J. H. Lydall.*

D. P.

---

## *In re* FINDLAY (AN INFANT).



*Appointment of New Trustee—Vesting Order—Legacy to Infant invested in sole Name of Infant—Declaring Infant Trustee—Trustee Act*, 1850 (13 & 14 *Vict. c.* 60), *s.* 2—*Trustee Extension Act*, 1852 (15 & 16 *Vict. c.* 55), *s.* 3.

NOTE.

THE order made by Mr. Justice *North* in this case (reported *ante*, p. 221), besides declaring the infant a trustee within the meaning of the *Trustee Act*, 1850, of £100 *New Zealand* Consolidated 4 per Cent. Stock, part of a larger sum (which was transferable at the *Bank of England*), and directing that the right to transfer the same should vest in the guardian of the infant, and authorizing him to effect a sale thereof (on which point alone

NORTH, J. 1886 *In re* FINDLAY (AN INFANT).

the case called for a report), provided that the dividends on the remainder of the stock, and on the whole until sale, should be paid to the guardian of the infant, pursuant to the Act 11 Geo. 4 & 1 Will. 4, c. 65.

When the order was served upon the bank they objected to act upon it, in so far as it declared the infant a trustee and directed that the right to transfer the £100 stock should vest in the guardian, on the ground that there was no jurisdiction to declare the infant a trustee within the meaning of the *Trustee Act*, or to make any order upon that footing.

Ultimately the Petitioner's solicitors agreed to abandon that part of the order, and the bank consented to act on the remainder of the order. A memorandum to this effect was written at the foot of the order, and was signed by the Petitioner's solicitors.

W. L. C.

END OF VOL. XXXII.

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1886, will be as follows:—

In the First Series,
31 Ch. D.

In the Second Series,
16 Q. B. D. 11 P. D.

In the Third Series,
11 App. Cas.

# INDEX.


**ABANDONMENT**—Railway - - 438
*See* RAILWAY COMPANY.

**ABSCONDING TRUSTEE** - - - 225
*See* TRUSTEE ACTS. 1.

**ACCEPTANCE**—Bill of exchange—Person not a party - - - - 447
*See* BILL OF EXCHANGE.

**ACCUMULATION**—Maintenance of infant
*See* INFANT. 1, 2. [229, 383

**ACQUIESCENCE**—Land taken by Commissioners of Sewers - - - - 72
*See* COMMISSIONERS OF SEWERS.

**ADMINISTRATION ACTION**—*Costs of Bankrupt Executor Debtor to Estate.*] A sole executor, who was a defendant to an administration action, became bankrupt after the administration judgment. He was a debtor to the estate in respect of money advanced to him by the testator in his lifetime:—*Held*, that the executor must have his costs subsequently to the bankruptcy, but that his prior costs must be set off against the debt due from him.—*In re Basham* (23 Ch. D. 195) followed. *In re* VOWLES. O'DONOGHUE *v.* VOWLES [243

**AFFIDAVIT**—Cross-examination on - 133
*See* PRACTICE. 5.

**AFTER-ACQUIRED PROPERTY** - - 361
*See* SETTLEMENT. 1.

**AGENT**—Solicitor—Taxation of costs - 245
*See* SOLICITOR. 1.

**AMALGAMATION**—Company - - 301
*See* COMPANY. 1.

**ANNUITY**—Charge on real estate - - 525
*See* SETTLEMENT. 3.

**APPEAL** — Judgment by default — Lancaster Court - - - - 403
*See* LANCASTER COURT.

**APPOINTMENT** - - - 508, 604
*See* POWER. 1, 2.

**ARTICLES OF ASSOCIATION** - - 266
*See* COMPANY. 2.

**ASSIGNMENT**—Trade-mark - - 213
*See* TRADE-MARK. 1.

**ATTACHMENT**—Solicitor—Order for payment—Default - - - - 342
*See* SOLICITOR. 4.

**AUTHORITY**—Agent - - - 337
*See* COMPANY. 3.

**BANKERS' BOOKS**—Inspection - - 499
*See* PRACTICE. 2.

**BILL OF COSTS**—Taxation - - 36, 209, 245
*See* SOLICITOR. 1, 2, 3.

**BILL OF EXCHANGE**—*Drawn against Partnership Firm—Acceptance by one of the Partners—Joint or separate Liability—Practice—Originating Summons—Estate of deceased Partner—Rules of Supreme Court*, 1883, *Order* LV., *rr.* 3, 10.] A bill of exchange was drawn against a firm of B. & Co. B., one of the partners, accepted the bill, signing the name of the firm "B. & Co." and adding his own underneath. B. died, and the holder of the bill took out an originating summons for the administration of B.'s estate, on which an order was made for the administration of the estate, distinguishing the separate from the partnership debts:—*Held*, that the acceptance of the bill was the acceptance of the firm, and that the addition of B.'s name did not make him separately liable.—And, it having been proved that B.'s estate was insufficient for the payment of his separate debts, and therefore that no part would be available for payment of the partnership debts, the summons was dismissed.—Whether a joint creditor of a partnership firm can take out an originating summons for the administration of the estate of the deceased partner, *quære*. *In re* BARNARD. EDWARDS *v.* BARNARD - C. A. 447

**BILL OF SALE**—*Chattels—Railway Wagons—Sale and re-letting—Hiring Agreement—Option of Purchase—Loan Transaction—Bill of Sale—Railway Company—Use of Railway—Supply of Locomotive Power—"Tolls"—Carriers' Charges—Lien—Bills of Sale Act* (1878) *Amendment Act*, 1882, *s.* 9—*Railways Clauses Consolidation Act*, 1845, *ss.* 3, 97.] The B. company, a colliery company, being in want of money, applied for assistance to the Plaintiffs, a wagon company. After some negotiations, the Plaintiffs paid to or

**BILL OF SALE**—*continued.*

on behalf of the B. company, £1000, for which the Plaintiffs took receipts and an invoice describing the £1000 as the purchase-money for 100 railway wagons.—Simultaneously the B. company and the Plaintiffs executed an agreement by which the Plaintiffs let the 100 wagons to the B. company for three years at a rent payable quarterly, the total rent for the three years amounting to a sum representing £1000 and interest thereon at £7 per cent. per annum. By the agreement the Plaintiffs were authorized, in case of a quarter's rent being in arrear for seven days, to seize the wagons and put an end to the agreement; and option was given to the B. company of purchasing the wagons at the end of the term for a nominal sum. The wagons bore the "name-plates" of both companies. The B. company then proceeded to send coal from their colliery to their customers in these wagons over the railway of the Defendants, a railway company, who sent in monthly accounts to the B. company, charging against each wagon-load a sum for "carriage," made up of a charge (as authorized by the Defendants' special Act) for the use of the railway and an additional charge for the supply of locomotive power.—The B. company having become insolvent, and a sum being due to the Defendants on the monthly accounts, the Defendants detained nine of the wagons then on their line, claiming to have a lien on them for the unpaid "tolls" under sect. 97 of the Railways Clauses Consolidation Act, 1845.—Two quarters' rent being in arrear under the agreement, the Plaintiffs seized such of the 100 wagons as they could obtain possession of, and brought an action against the Defendants for the delivery up of the nine in their possession.—Action dismissed with costs, on the ground (1) That the transaction carried out by the agreement was, in substance, a loan, and that the agreement, receipts and invoice, constituted a "bill of sale" within the meaning of the Bills of Sale Act (1878) Amendment Act, 1882; and that, as these documents were not registered and not in the form prescribed by sect. 9, the transaction was void: and (2), that the sum due from the B. company to the Defendants for the use of the railway and the supply of locomotive power, constituted "tolls" for which the Defendants were entitled to a lien under sect. 97 of the Railways Clauses Act. North Central Wagon Company *v.* Manchester, Sheffield, and Lincolnshire Railway Company [477

**BREACH OF TRUST** - - - 560, 597
*See* Trustee. 1, 2.

**BRICKFIELD**—Investment - - - 196
*See* Trustee. 3.

**CANCELLATION**—Marriage settlement - 238
*See* Settlement. 2.

**CASES**—*Aird's Estate, In re* (12 Ch. D. 291). followed - - - - 517
*See* Will. 3.

—— *Banner, Ex parte* (17 Ch. D. 480), commented on - - - - 266
*See* Company. 2.

**CASES**—*continued.*

—— *Basham, In re* (23 Ch. D. 195), followed 243
*See* Administration Action.

—— *Blake* v. *Harvey* (29 Ch. D. 827) observed upon - - - - - 635
*See* Practice. 10.

—— *Bolton* v. *London School Board* (7 Ch. D. 766) distinguished - - - 421
*See* Public Health Act.

—— *Bradford Banking Company* v. *Briggs & Co.* (31 Ch. D. 19) followed - - 266
*See* Company. 2.

—— *Callisher* v. *Bischoffsheim* (Law Rep. 5 Q. B. 449) approved - - - 266
*See* Company. 2.

—— *Carpenter, In re* (Kay, 418), approved 333
*See* Trustee Act. 3.

—— *Chapman's Case* (Law Rep. 1 Eq. 346) followed - - - - 366
*See* Company. 7.

—— *Clark's Trust, In re* (1 Ch. D. 497), considered - - - - 154
*See* Charity. 1.

—— *Coles* v. *Bristowe* (Law Rep. 4 Ch. 3) followed - - - - 625
*See* Stock Exchange.

—— *Cook* v. *Wright* (1 B. & S. 559) approved 266
*See* Company. 2.

—— *Cordingley* v. *Cheeseborough* (4 D. F. & J. 379) commented on - - - 14
*See* Vendor and Purchaser. 1.

—— *Elder* v. *Maclean* (5 W. R. 447) observed upon - - - - - 460
*See* Mortgage. 7.

—— *Gardner* v. *Cowles* (3 Ch. D. 304) followed
*See* Trustee Acts. 2. [221

—— *Gibbons* v. *Snape* (1 D. J. & S. 621) followed - - - - - 95
*See* Tenant in Tail.

—— *Guthrie* v. *Walrond* (22 Ch. D. 573) distinguished - - - - 408
*See* Will. 1.

—— *Hall* v. *Liardet* (W. N. 1883, pp. 165, 194) approved of and followed - - 592
*See* Practice. 9.

—— *Harding, Ex parte* (Law Rep. 3 Eq. 341), distinguished - - - 366
*See* Company. 7.

—— *Havelock* v. *Havelock* (17 Ch. D. 807) distinguished - - - - 383
*See* Infant. 2.

—— ——— v. ——— (17 Ch. D. 807) followed - - - - 229
*See* Infant. 1.

—— *Higgins & Hitchman's Contract, In re* (21 Ch. D. 95) approved - - 454
*See* Vendor and Purchaser. 2.

—— *Honywood* v. *Foster* (30 Beav. 1) followed 95
*See* Tenant in Tail.

—— *James, Ex parte* (Law Rep. 9 Ch. 609) followed - - - - - 597
*See* Trustee. 1.

—— *Jenner-Fust* v. *Needham* (31 Ch. D. 500) not followed - - - - 194
*See* Mortgage. 2.

**CASES**—*continued.*

—— *Marsh, In re* (15 Q. B. D. 340) distinguished *See* SOLICITOR. 3. [36

—— *Ockford* v. *Barelli* (20 W. R. 116) approved *See* COMPANY. 2. [266

—— *Pearson, Re* (51 L. T. (N.S.) 692) not followed - - - - 196 *See* TRUSTEE. 3.

—— *Rivett-Carnac's (Sir J.) Will, In re* (30 Ch. D. 136), considered - - 162 *See* SETTLED LAND ACT. 2.

—— *Simmonds, Ex parte* (16 Q. B. D. 308) followed - - - - 597 *See* TRUSTEE. 1.

—— *Syer* v. *Gladstone* (30 Ch. D. 614) distinguished - - - - 408 *See* WILL. 1.

—— *Taylor's Estate, In re* (22 Ch. D. 495) considered - - - - 517 *See* WILL. 3.

—— *Thomas* v. *Daw* (Law Rep. 2 Ch. 1) distinguished - - - - 72 *See* COMMISSIONERS OF SEWERS.

—— *Whittemore* v. *Whittemore* (Law Rep. 8 Eq. 603) commented on - - 14 *See* VENDOR AND PURCHASER. 1.

—— *Woolley* v. *Colman* (21 Ch. D. 169) not followed as to security for costs - 220 *See* MORTGAGE. 4.

—— *Worthington & Co.'s Trade-Mark, In re* (14 Ch. D. 8) followed - - 109 *See* TRADE-MARK. 3.

—— *Yielding & Westbrook, In re* (31 Ch. D. 344), approved - - - - 454 *See* VENDOR AND PURCHASER. 2.

**CERTIFICATE** — Chief Clerk — Raising fresh question - - - - 639 *See* PRACTICE. 1.

**CHAMBERS**—Practice in - - - 352 *See* PRACTICE. 8.

**CHANCERY DIVISION**—Jurisdiction—Person of unsound mind - - - 39 *See* LUNATIC.

**CHARITY**—*Friendly Society — Cy-près — Charitable Fund—"Voluntary Contributions"—Action—Charity Commissioners — Consent — Exemption—Charitable Trusts Act*, 1853 (16 & 17 *Vict. c.* 137), *ss.* 17, 62—*A Friendly Society held to be a Charity.*] In 1862, on the occasion of an accident at the Hartley Colliery, in Northumberland, a fund was raised by voluntary subscriptions and vested in trustees for the relief of the sufferers and their families. There being an ultimate surplus, the managers of the fund proposed to apportion it among several mining districts, including South Durham, for the relief of suffering occasioned by colliery accidents in those districts, and in aid of relief funds already in operation there.—By the rules of a Miners' Relief Fund Friendly Society established in 1862 for certain counties, including the county of Durham, provision was made for raising funds by voluntary subscriptions among the members (required to be persons employed in coal or other mines), and by donations, for defraying the funeral expenses of members, supporting their families, assisting

**CHARITY**—*continued.*

members disabled by accident, old age or infirmity, and for payment of a sum at the death of a member:—*Held*, in an action by the surviving trustee of the Hartley Colliery Fund, that the friendly society was a "charity," and that that portion of the fund intended for the South Durham district might be applied cy-près by payment to four of the trustees of the friendly society, to be applied by them, according to the rules of the society, for the relief of suffering occasioned by colliery accidents in the South Durham district, and for no other purpose:—*Held*, also, that the Hartley Colliery Fund, being a fund arising wholly from "voluntary contributions," was exempted by sect. 62 of the Charitable Trusts Act, 1853, from the operation of the Act, and that therefore the consent of the Charity Commissioners to the action, under sect. 17, was unnecessary.—*In re Clark's Trust* (1 Ch. D. 497) considered. PEASE *v.* PATTINSON - - 154

2. —— *Friendly Society—Cy-près—Society for Benefit of Members of a Theatrical Company.*] A friendly society established for providing medical attendance and annuities for sick and incapacitated members of the York company of actors and actresses, and for paying their funeral expenses, was *held* to be a charity, and the objects of the society having failed, the funds were ordered to be applied for charitable purposes cy-près. SPILLER *v.* MAUDE - - 158, n.

**COMMISSIONERS**—Charity - - 154 *See* CHARITY. 1.

**COMMISSIONERS OF SEWERS**—*Power to take Land*—57 *Geo.* 3, *c. xxix.—City of London Sewers Act*, 1848 (11 & 12 *Vict. c. clxiii.*), *s.* 120—*Acquiescence—Adjudication by Commissioners.*] The Plaintiff was owner of six adjacent houses, five in G. Place, and one in Butler's Alley. Four of the houses in G. Place adjoined Butler's Alley. On the 2nd of December, 1884, the Commissioners of Sewers resolved to alter, widen, and extend Butler's Alley, and adjudicated that the Plaintiff's six houses were required for that purpose. Shortly afterwards they served the Plaintiff with a notice to treat, which stated that the houses were required for altering and widening Butler's Alley. The Plaintiff sent in a claim for £2500. The parties could not agree about the price, and in October, 1885, the negotiations having come to an end, the Commissioners proceeded to summon a jury. The Plaintiff then made inquiry as to their plans, and commenced this action to prevent them from taking the property. It appeared from a plan sent to the Plaintiff in November, 1885, which was the first information he had as to the nature of the alterations proposed by the Commissioners, that the part of Butler's Alley which lay at the back of the four houses in G. Place was only to be widened by a strip tapering from the width of twelve inches to a point, and it appeared that considerable alterations were to be made in the level of G. Place and Butler's Alley. The Plaintiff moved for an injunction:—*Held*, by Kay, J., that the Plaintiff not having objected to the notice to treat, but having negotiated for the sale, was estopped from disputing the right of the Commissioners to take the property as in *Thomas* v. *Daw* (Law Rep. 2 Ch. 1).—*Held*, on appeal,

**COMMISSIONERS OF SEWERS**—*continued.*

that *Thomas* v. *Daw* was inapplicable, as in that case the plaintiff knew all along what the plans of the Commissioners were, whereas in the present case the Plaintiff did not know them till after the negotiations were at an end, and was justified in believing the representation in the notice that his houses were required for altering and widening Butler's Alley, and that the Plaintiff's conduct had not been such as to debar him from asserting his rights:—*Held*, that it was a question to be tried at the hearing whether the only real object of the Commissioners as to the part of Butler's Alley adjoining the Plaintiff's houses was not to lower its level, and whether the minute widening of that street was not merely colourable, and proposed in order to give them power to purchase under their Act, which gave them a power of compulsory purchase for the purpose of widening streets, but not for the purpose of altering levels.—*Held*, therefore, that the Commissioners ought to be restrained, till the hearing or further order, from proceeding to assess the value of the Plaintiff's houses.—An adjudication of the Commissioners that a certain property is required for the purpose of alterations cannot be supported if there are no grounds on which any reasonable person could come to the conclusion that it was so required.—The Commissioners cannot validly adjudicate that a property is required for the purposes of an improvement until they have determined what the improvement is to be, so far as to furnish materials for judging whether the property is required. Lynch *v.* Commissioners of Sewers of the City of London - - - - C. A. 72

**COMPANY**—*Amalgamation—Exchange of Shares—Executors—Contract to take Shares—Personal Liability.*] Upon the amalgamation in 1882 between the S. and C. banking companies, A., a holder of 100 shares in the S. Bank, received a circular asking whether he would exchange his shares in the S. Bank for shares in the C. Bank, which took over the business of the other.—A. died shortly afterwards without having sent any reply to the circular. On the 27th of February, 1883, a letter was sent on behalf of A.'s executors to the C. Bank "enclosing certificate for 100 shares of the S. Bank in the name of" A., "and will thank you to let us have shares in your bank in exchange." On the 28th of February the manager replied that when probate had been exhibited to the London agents of the bank he would send share certificates in the bank "in the name of the executors individually." A certificate was made out to the executors of 100 shares in the C. Bank, and an entry made in the share register with the description, "executors of A." The executors wrote that they objected to have the certificate in their names, and requested the bank to forward them one in the name of A.—The directors accordingly ordered the certificate to be cancelled and one made out in the name of A. for 100 shares.—On summons by the liquidator for rectification of the register by striking out the name of A., and putting in place of it the names of the executors as holders of the 100 shares:—*Held*, that the letters of the 27th and 28th of February constituted by application and acceptance a completed contract between the

**COMPANY**—*continued.*

executors and the bank that 100 shares should be taken in the names of the executors individually, and further, that such completed contract was not, and could not have been, afterwards rescinded by the company.—Order of Kay, J., rectifying the register affirmed. *In re* Cheshire Banking Company. Duff's Executors' Case C. A. 301

2. —— *Articles of Association—Paramount Lien on Shares of Member—Mortgage of Shares by Member—Priority—Contract—Compromise—Consideration—Forbearance of threatened Proceedings—Agreement not capable of being performed by both Parties within a Year—Performance by one Party—Statute of Frauds.*] The articles of association of a limited company provided that the company should have "a first and paramount lien" upon the shares of every member for his debts, liabilities, and engagements to the company. A shareholder made an equitable mortgage of his shares in favour of the Plaintiff as security for an advance, and the Plaintiff gave the company notice of his charge. After the date of the notice the shareholder gave a written guarantee to the company:—*Held*, in accordance with *Bradford Banking Company* v. *Briggs & Co.* (31 Ch. D. 19), that, supposing the guarantee to have been given for valuable consideration, the company were by virtue of their articles entitled to priority for their claims over the charge in favour of the Plaintiff.—The guarantor was not only a shareholder, but he was also a director of and the vendor to the company. The guarantee was given at a general meeting of the shareholders after an angry discussion had taken place, but it did not appear that any resolution was passed at such meeting with reference to it. It was that a minimum dividend should be paid to the shareholders yearly during ninety years; and that the guarantor should pay sums sufficient to make up that minimum in every year in which the company had not earned it. There was no consideration for the giving of the guarantee upon the face of the instrument, but it was found by North, J., that it was in fact given in consideration of an agreement come to at the general meeting of the shareholders to abandon proceedings in contemplation against the guarantor, and it was held by his Lordship that such an agreement to abandon threatened proceedings when followed, as in this case, by actual abstention from proceedings, constituted an agreement performed by one party within one year from the making thereof, and that the case was not within the 4th section of Statute of Frauds, and further, that the 4th section could not be invoked against a defendant in an action of this character:—*Held*, upon appeal, by Cotton and Fry, L.JJ. (Bowen, L.J., dissentiente), that there was no sufficient evidence of any intended claim by the company or the shareholders against the guarantor, or any contract binding the company to abandon such claim, and accordingly that there was no consideration to support the guarantee.—*Held*, by Bowen, L.J., concurring with North, J., that upon the evidence proceedings had in fact been threatened, and were dropped in consequence of the guarantee; and that this was sufficient consideration to support it.—A bonâ fide compromise of a real claim

**COMPANY**—*continued.*
is good consideration, whether the claim would have been successful or not.—*Cook* v. *Wright* (1 B. & S. 559); *Callisher* v. *Bischoffsheim* (Law Rep. 5 Q. B. 449); and *Ockford* v. *Barelli* (20 W. R. 116), approved, and the observations in *Ex parte Banner* (17 Ch. D. 480, 490) by Lord Esher, M.R., on the authority of these cases, dissented from by the Court. MILES *v.* NEW ZEALAND ALFORD ESTATE COMPANY - - C. A. 266

3. —— *Memorandum of Association—Signature by Agent—Authority of Agent to sign—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 6, 11.] C. verbally authorized O. to sign on his behalf the memorandum of association of a company. O. accordingly signed the name of C. to the memorandum without his own name appearing. The company being in course of winding-up, C. was put on the list, and applied to have his name removed, on the ground that he had never signed the memorandum nor agreed to take shares:—*Held*, that there being nothing in the Companies Act, 1862, to shew that the Legislature intended anything special as to the mode of signature of the memorandum, the ordinary rule applied that signature by an agent is sufficient:—*Held*, also, that although by sect. 11 of the Act a subscriber is bound in the same way as if he had signed and sealed the memorandum, still the memorandum is not a deed, and it is not necessary that the authority to sign it should be given by deed:—*Held*, also, that though it was irregular for O. to sign C.'s name without denoting that it was signed by O. as his attorney, the signature was not on that ground invalid:—*Held*, therefore (affirming the decision of Bacon, V.C.), that C. was not entitled to have his name removed from the list. *In re* WHITLEY PARTNERS, LIMITED - C. A. 337

4. —— *Voluntary Winding-up—Future Liabilities—Lease—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 133, *sub-s.* 1.] An injunction was granted, on motion by the lessor, to restrain a company in voluntary liquidation from distributing assets among its shareholders without setting aside sufficient assets to provide for future rent and other liabilities under a lease. An appeal from this decision was compromised. GOOCH *v.* LONDON BANKING ASSOCIATION - C. A. 41

5. —— *Winding-up — Petition — Subsequent Summonses before a Magistrate to recover Penalties—Quasi-Criminal Proceedings against the Company—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 85—*Jurisdiction—Injunction.*] A petition had been presented for the winding-up of a company, but before any order was made for that purpose summonses were taken out at a police-court against the company, by a person not interested in the affairs of the company, to recover penalties for alleged offences under the Companies Act, 1862, and the Life Assurance Companies Act, 1870. On the motion for an injunction to restrain the proceedings against the company before the magistrate, the Court *held*, that it had jurisdiction under the 85th section of the Act of 1862, and made the order. *In re* BRITON MEDICAL AND GENERAL LIFE ASSURANCE ASSOCIATION - 503

6. —— *Winding-up Petition—Locus Standi—Petition by Executor—Probate obtained after presentation of Petition.*] The executor of a creditor

**COMPANY**—*continued.*
of a company is entitled to present a winding-up petition before he has obtained probate; it is sufficient if he has obtained probate before the hearing of the petition. *In re* MASONIC AND GENERAL LIFE ASSURANCE COMPANY - 373

7. —— *Winding-up—Servants' Salary—Notice of Discharge.*] The rule that an order for winding-up a company operates as a notice of discharge to the servants when the business of the company is not continued after the date of the order, applies though the liquidator without continuing the business employs the servants in analogous duties with a view to reconstruction.—*Chapman's Case* (Law Rep. 1 Eq. 346) followed.—*Ex parte Harding* (Law Rep. 3 Eq. 341) distinguished. *In re* ORIENTAL BANK CORPORATION. MACDOWALL'S CASE - - - - 366

8. —— *Winding-up—Service out of Jurisdiction—Jurisdiction*—25 & 26 *Vict. c.* 89, *s.* 170.] The Court has no jurisdiction to give leave to serve notices of orders and other proceedings in the winding-up of a company on persons residing out of the jurisdiction. *In re* ANGLO-AFRICAN STEAMSHIP COMPANY - - - - C. A. 348

**COMPENSATION**—Abandonment of railway 438
*See* RAILWAY COMPANY.

—— Conditions of sale - - - 14
*See* VENDOR AND PURCHASER. 1.

**COMPROMISE**—Consideration for guarantee 266
*See* COMPANY. 2.

**CONDITION**—Name and arms clause - 388
*See* WILL. 2.

**CONDITIONS OF SALE** - - - 14
*See* VENDOR AND PURCHASER. 1.

**CONSIDERATION**—Guarantee - - 266
*See* COMPANY. 2.

**CONTRACT**—To take shares - - 301
*See* COMPANY. 1.

**COPYHOLDS**—Disentailing assurance - 95
*See* TENANT IN TAIL.

**COSTS**—Administration action - - 243
*See* ADMINISTRATION ACTION.

—— Administration action—Joint and separate creditors - - - - 613
*See* PRACTICE. 3.

—— Foreclosure action - - - 460
*See* MORTGAGE. 7.

—— Higher or lower scale - - - 399
*See* PRACTICE. 4.

—— Investigation of title - - - 454
*See* VENDOR AND PURCHASER. 2.

—— Parliamentary proceedings - - 162
*See* SETTLED LAND ACT. 2.

—— Security for - - - - 220
*See* MORTGAGE. 3.

—— Solicitor—Taxation - - - 209
*See* SOLICITOR. 2.

**COUNTY COURT**—Jurisdiction—Friendly society
*See* FRIENDLY SOCIETY. [585

**COVENANT**—Mortgage deed—Joinder of claims
*See* PRACTICE. 10. [635

—— To build station—To repair fences—Abandonment of railway - - 438
*See* RAILWAY COMPANY.

**COVENANT**—*continued.*
—— To surrender — Copyhold — Disentailing assurance - - - - 95
*See* Tenant in Tail.
**CROSS-EXAMINATION**—Affidavit witness 133
*See* Practice. 5.
**CUSTOM OF STOCK EXCHANGE** - - 625
*See* Stock Exchange.
**CY-PRÈS**—Charity - - - 154, 158, n.
*See* Charity. 1, 2.

**DEED**—Proof of - - - - - 35
*See* Practice. 6.
**DEFAULTING DEFENDANT** - - 192
*See* Specific Performance.
**DELAY**—Claim against residuary legatees 571
*See* Mortgage. 1.
**DEPOSIT**—Railway company—Abandonment 438
*See* Railway Company.
—— Sale by auction—Return of—Interest 454
*See* Vendor and Purchaser. 2.
**DISCLAIMER**—Incumbered and unincumbered estates - - - - 408
*See* Will. 1.
—— Trade-mark—Words common to trade 311
*See* Trade-mark. 2.
**DISCOVERY**—Bankers' books - - 499
*See* Practice. 2.
**DISENTAILING DEED**—Copyholds - 95
*See* Tenant in Tail.
—— Effect of—Personal estate - - 388
*See* Will. 2.
**DISSOLUTION**—Partnership - - 355
*See* Partnership.
**DOCUMENTS**—Production of - - 499
*See* Practice. 2.

**EASEMENT**—*Grant—Extinguishment — Merger.*] In 1820 the owners granted a lease of a strip of land intersecting their estate for the purpose of a canal, with a proviso that the lessors, their heirs, and assigns, might use the demised land for road and other purposes, so as not to injure the canal. In 1838, A., B., and C., the then co-owners of the estate, by partition deed conveyed the reversion of part of the canal to the use of B., and the abutting lands to A. and C. severally. In 1839 B. conveyed the reversion in that part of the canal to the lessees:—*Held*, that whether the proviso in the lease did or did not operate as a re-grant of an easement, the merger of the lease put an end to the right conferred by the proviso in respect to that part of the canal. Lord Dynevor *v.* Tennant - - - - - - 375
—— Watercourse - - - - 549
*See* Watercourse.
**EQUITABLE INTEREST**—Trustee — Breach of trust—Recouping beneficiaries - 597
*See* Trustee. 1.
**EVIDENCE**—Cross-examination on affidavit 133
*See* Practice. 5.
—— Inspection of banker's books - - 499
*See* Practice. 2.
**EVIDENCE**—*continued.*
—— Proof of deed - - - - 35
*See* Practice. 6.
—— To contradict recital in will - - 517
*See* Will. 3.
**EXECUTOR** — *Retainer — Administration — Receiver.*] An executor proved in a creditor's action for £115 due to him by his testator; on the appointment of a receiver he handed over assets to a larger amount than £115 to the receiver: he afterwards paid a creditor £700 for which he was surety, and interest;—*Held*, that the executor had priority in respect of the £115, and was entitled only to stand in the place of the original creditor in respect of the £700 without interest. *In re* Harrison. Latimer *v.* Harrison - - 395
—— Appointment of—Exercise of testamentary power - - - - 508
*See* Power. 1.
—— Contract to take shares—Personal liability
*See* Company. 1. [301
—— Costs—Bankrupt executor - - 243
*See* Administration Action.
—— Right to petition for winding up—Proof of will - - - - - 373
*See* Company. 6.
—— Redemption of mortgage by—Realty and personalty - - - - 430
*See* Mortgage. 9.
**EXTENSION OF TIME** — Appeal — Lancaster Court - - - - 403
*See* Lancaster Court.
**EXTINGUISHMENT**—Easement - - 375
*See* Easement.

**FOLLOWING ASSETS** — Claim by mortgagee against residuary legatee - - 571
*See* Mortgage. 1.
**FORECLOSURE** - - 194, 220, 460, 582
*See* Mortgage, 2, 3, 4, 7.
**FORFEITURE**—Name and arms clause — Personal estate - - - - 388
*See* Will. 2.
**FOUR-DAY ORDER** - - - - 192
*See* Specific Performance.
**FRAUDS, STATUTE OF**—Guarantee - 366
*See* Company. 7.
**FRIENDLY SOCIETY** — *Jurisdiction of County Court—Special Resolution for Amalgamation — Dissatisfied Members*—38 & 39 *Vict. c.* 60, *ss.* 22, 24, *sub-s.* 8; *s.* 25, *sub-s.* 7; *s.* 30, *sub-s.* 10—*Prohibition.*] The committee of a friendly society having agreed for the amalgamation of the society with another company, summoned a general meeting in order to pass a special resolution for carrying the amalgamation into effect. Some of the members who were dissatisfied with the provision proposed to be made for the satisfaction of their claims, filed a plaint in the County Court to restrain the society from carrying into effect the amalgamation, and obtained a receiver of the assets of the society, although the resolution for amalgamation had not then been passed. The public officer of the society applied for a writ of prohibition to restrain the proceedings in the County Court:—*Held* (affirming the decision of

**FRIENDLY SOCIETY**—*continued.*
Bacon, V.C., that the County Court had no jurisdiction to interfere with the action of the society until the special resolution had been passed and confirmed, and a writ of prohibition was ordered to issue. Jones *v.* Slee - - C. A. 585
—— Charity—Cy-près - - 154, 158, n.
*See* Charity. 1, 2.
**FURTHER CONSIDERATION**—Order on - 192
*See* Specific Performance.

**GARNISHEE ORDER** - - - 512
*See* Practice. 7.
**GENERAL ORDER UNDER SOLICITORS' REMUNERATION ACT, r. 2 (c); Sched. I., Pt. I., r. 2** - - - - - 209
*See* Solicitor. 2.
**GOODWILL**—Assignment of - - 213
*See* Trade-mark. 1.
**GRANT**—Easement - - - - 375
*See* Easement.
**GUARANTEE**—Statute of Frauds - - 266
*See* Company. 2.
**GUARDIAN**—Infant—Appointment of 221, 641
*See* Trustee Acts. 2.

**HEIRLOOMS**—Settled Land Act - 1, 233
*See* Settled Land Act. 1, 4.
**HIRING AGREEMENT**—Railway wagons 477
*See* Bill of Sale.
**HOTCHPOT**—Mistake in will—Amount of advance - - - - 517
*See* Will. 3.

**INCUMBERED ESTATES**—Repairs—Power of management - - - 408
*See* Will. 1.
**INCUMBRANCES**—Settled Land Act - 1
*See* Settled Land Act. 1.
**INDEMNITY**—Sale of shares—Custom of stock exchange - - - - 625
*See* Stock Exchange.

**INFANT**—*Maintenance—Accumulation.*] A testator directed the income of his real and personal estate to be accumulated for twenty-one years, and gave the accumulated estates to his sister J. C. for life, then to her son W. for life, and after his decease to his children in tail male, and then to her son J. for life, and then to her son A. in tail male.—The Court directed an annual sum to be paid to J. C. out of the income of the personal estate for the maintenance and education of her three sons.—*Havelock* v. *Havelock* (17 Ch. D. 807) followed. *In re* Collins. Collins *v.* Collins [229

2. —— *Maintenance — Accumulation — Jurisdiction to allow Maintenance to Tenant for Life notwithstanding prior Trust for Accumulation of whole Income during a Term of Years.*] Where a testator has by his will made a settlement of his estate, subject to a prior trust for the accumulation of the whole income during a term of years not exceeding the legal limit, the Court has, in the absence of special circumstances, no jurisdiction to order an allowance to be paid out of the

**INFANT**—*continued.*
income for the maintenance and education of the person who will, if he is living at the end of the term, be the tenant for life, even if there is no other way in which a provision can be made for his maintenance and education.—*Havelock* v. *Havelock* (17 Ch. D. 807) distinguished.—A testator devised his real estate to trustees for a term of twenty years after his death, and, after the expiration of the term, and in the meantime subject thereto, to the use of the Plaintiff for life, with remainder to the use of his first and other sons successively in tail, with remainders over. Under the trusts of the term the rents were to be accumulated for a period of twenty years after the testator's death. The income of the testator's residuary personalty was subject to a similar trust. At the end of the twenty years the residuary personalty and the accumulations of the income and of the rents were to be laid out in the purchase of real estate, which was limited to the same uses. The will contained no provision for the maintenance of the Plaintiff during the term. He was not the heir-at-law of the testator, but he was the eldest son of a favourite niece of the testator, who had before her marriage lived a good deal with him and had been educated at his expense. The testator was a tenant farmer. The rental of his real estate was about £440 per annum; his personal estate was about £10,000. An order had been made in the action allowing £300 a year for the maintenance and education of the Plaintiff during his minority. After he had attained twenty-one the Plaintiff applied for the continuance of the allowance until further order: —*Held*, that, there being no special circumstances, there was no jurisdiction to interfere any further with the trust for accumulation. *In re* Alford. Hunt *v.* Parry - - - - 383
—— Guardian—Vesting order—Trustee Act
*See* Trustee Acts. 2. [221, 641
**INJUNCTION**—Obtained by misrepresentation
*See* Public Health Act. [421
—— Voluntary winding-up—Future liabilities
*See* Company. 4. [41
—— Winding-up of company—Criminal proceedings - - - - - 503
*See* Company. 5.
**INTEREST**—Deposit on sale of land - 454
*See* Vendor and Purchaser. 2.
**INTERROGATORIES** - - 352, 592
*See* Practice. 8, 9.
**INVESTMENT**—Trustee - - - 196
*See* Trustee. 3.

**JOINDER OF CLAIMS** - - - 635
*See* Practice. 10.
**JUDGMENT BY DEFAULT**—Appeal—Lancaster Court - - - - 403
*See* Lancaster Court.
**JURISDICTION**—Action to compel signature—Notice of dissolution of partnership 355
*See* Partnership.
—— Chief Clerk—Striking out interrogatories
*See* Practice. 8. [352
—— County Court—Friendly society - 585
*See* Friendly Society.

**JURISDICTION**—*continued.*
—— Person of unsound mind - - 39
*See* Lunatic.
—— Service out of - - - - 123
*See* Practice. 11.

**LANCASTER COURT**—*Practice—Judgment by Default—Appeal—Time for appealing—Extension of Time—Rules of Palatine Court, Order xxxiii., r.* 21.] According to the true construction of Order xxxiii. rule 21, of the Rules of the Palatine Court of Lancaster a party against whom judgment has been given by default must make application to set it aside within six days if the Court be then sitting, and, if it be not then sitting, on the next day on which the Court shall be sitting to hear such motions.—An application for extension of time by a party who desires to apply to set aside a judgment made against him by default, may be made at the time when he makes the application to set aside the judgment, if the action is still pending. Bradshaw *v.* Warlow [C. A. 403

**LANDLORD AND TENANT**—Watercourse 549
*See* Watercourse.

**LANDS CLAUSES ACT**—*Vendor and Purchaser—Specific Performance—Public Undertaking—Possession—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *ss.* 76, 85.] The Plaintiff, a lessee of premises required for a street improvement, contracted to sell a lease of the premises for twenty-one years to the Metropolitan Board of Works. The purchasers required an abatement on the ground that the lease was found to be determinable at the end of seven or fourteen years by the lessor. The Plaintiff claimed specific performance. Pending the action the Board applied to be let into possession on payment into Court of the whole purchase-money claimed, and Pearson, J., made an order for letting them into possession on their paying into Court that sum with interest:—*Held*, on appeal, that though the Board could, by taking the steps prescribed by the Lands Clauses Act, have obtained immediate possession of the property, yet as they had not done so, they were in the same position as any other purchaser who was defendant to an action for specific performance, and were not entitled to have possession given to them pending the action. Bygrave *v.* Metropolitan Board of Works - - C. A. 147

**LEASE**—Merger—Easement - - 375
*See* Easement.
—— Mine - - - - - - 326
*See* Mine.
—— Voluntary winding-up of company—Future liabilities - - - - 41
*See* Company. 4.

**LIEN**—Company—Transfer of shares - 266
*See* Company. 2.

**LOCOMOTIVES**—Railway—Hiring agreement
*See* Bill of Sale. [477

**LONDON**—City of—Commissioners of Sewers 72
*See* Commissioners of Sewers.

**LUNATIC**—*Chancery Division—Jurisdiction—Person of Unsound Mind not so found—Maintenance.*] The jurisdiction of the Chancery Division to give directions as to the maintenance of a person of unsound mind not so found is not confined to applying the income for his maintenance, but extends to the application of capital for that purpose. *In re* Tuer's Will Trusts C. A. 39
—— Sale of real estate—Trustee Act - 333
*See* Trustee Acts. 3.

**MAINTENANCE**—Infant—Jurisdiction of the Court—Accumulations - 229, 383
*See* Infant. 1, 2.
—— Infant - - - - 221, 641
*See* Trustee Acts. 2.
—— Lunatic not so found—Jurisdiction - 39
*See* Lunatic.

**MARRIED WOMAN**—Copyhold—Disentailing assurance - - - - 95
*See* Tenant in Tail.

**MEMORANDUM OF ASSOCIATION** - 337
*See* Company. 3.

**MERGER**—Lease—Easement - - 375
*See* Easement.

**MINE**—*Purchaser in Possession—Mining Lease—Payment of Royalties into Court.*] The Plaintiffs commenced an action against the Defendant for specific performance of an agreement for a lease of a coal mine by the Plaintiffs to the Defendant at a royalty, as the Plaintiffs alleged, of 10*d.* per ton. The Defendant counter-claimed to have specific performance with a royalty of less amount. The Defendant was in possession and raising and selling large quantities of coal, but he alleged that he had expended on the mine more than the value of the coal raised. He also brought an action against the Plaintiffs in the Queen Bench Division to obtain damages for misrepresentations alleged to have been made to him for the purpose of inducing him to enter into the agreement, which action was still pending. The Plaintiffs moved for an interlocutory order that the Defendant might be ordered to pay into Court the amount of royalties at 10*d.* per ton on the coal he had raised. Bacon, V.C., refused the motion:—*Held*, on appeal, that although it would not be right, while the rate of royalty was in dispute, to order the Defendant to pay into Court the amount of royalties at the rate claimed by the Plaintiffs, he ought to be ordered to pay in the amount of royalties at the rate which he himself alleged to be the one agreed upon, and that as his carrying away coal diminished the value of the property he would not have the usual option of giving up possession instead of paying money into Court. Lewis *v.* James C. A. 326

**MISTAKE**—Of law—Repayment - - 597
*See* Trustee. 1.
—— Will—Amount of advance - - 517
*See* Will. 3.

**MISREPRESENTATION**—Ex parte motion 421
*See* Public Health Act.

**MORTGAGE**—*Following Assets—Claim by Mortgagee against Residuary Legatees—Acquiescence—Lapse of Time.*] The right of mortgagees of real estate whose security proves insufficient, to come against the residuary legatees of the mortgagor, amongst whom his personal estate has been distributed, is a purely equitable right, and

**MORTGAGE**—*continued.*

the Court will not enforce it if there are circumstances which would make it inequitable to do so.—A testator devised his freehold farm to two of his sons upon trusts for his children and issue, and directed that his unmarried daughters should be at liberty to carry on his farming business upon it, paying a rent of £600. He gave his residuary personal estate, in the events which happened, equally among his six children, the above two sons (who were executors as well as trustees) and his four daughters. The testator had made a first mortgage for £12,000, and a second mortgage for £2400, and his personal estate was under £11,000. Shortly after the death of the testator in 1859, the solicitors of the mortgagees made inquiry as to his affairs, and the solicitor of the trustees informed them of the state of the assets, and stated that the two unmarried daughters would probably carry on the farm for a time, and that their shares of the personal estate would no doubt afford them sufficient means to do so. The solicitors of the mortgagees wrote back to say that they should be glad to hear that the daughters were able to continue at the farm. The two daughters carried on the farm till 1863, when one of them married, and the farm was then let by the trustees to her husband. The interest was duly paid till 1880, when, owing to agricultural depression, the security proved insufficient. The mortgagee for £2400 in 1882 commenced an action to enforce his security, and to prove for the deficiency against the mortgaged estate, seeking to charge the executors with a devastavit in distributing the personalty without providing for his mortgage debt. Bacon, V.-C., held the executors not guilty of devastavit; they were charged with their own shares of the residuary personalty as assets in hand, and the balance found due from them was applied in payment of the mortgage debt, without prejudice to any proceeding to make the other residuary legatees refund. The Plaintiff then brought this action against the four daughters to recover the shares of personalty which they had received:—*Held* (affirming the decision of Bacon, V.-C.), that the Plaintiff could not recover, for that the mortgagees having assented to the distribution of the personal estate among the residuary legatees, could not, after this lapse of time, claim it back from them. BLAKE *v.* GALE - - C. A. 571

2. —— *Foreclosure Action—Practice—Receiver—Rents and Profits—Accounts—Foreclosure absolute.*] In a foreclosure action the fact that a receiver appointed by the Court had received rents since the certificate under the order nisi is no bar to an immediate order of foreclosure absolute on default of payment pursuant to the certificate.—*Jenner-Fust* v. *Needham* (31 Ch. D. 500) not followed. HOARE *v.* STEPHENS - - 194

3. —— *Foreclosure Action — Practice — Receipt of Rents by Receiver between Date of Certificate and Day fixed for Redemption.*] Where a receiver has received rents of mortgaged property between the date of the certificate under a foreclosure judgment and the day fixed for redemption the mortgagee is not entitled to the rents so received, except on the terms of bringing them into account as between mortgagee and mortgagor, and a fresh date must be fixed for redemption.—The Court to save the expense and delay of a further reference to Chambers allowed mortgagees to file an affidavit shewing the exact amount which would be due to them for principal, interest, and costs, after allowing for everything received, brought down to the day for which notice of motion was given to fix another day for redemption. JENNER-FUST *v.* NEEDHAM C. A. 582

4. —— *Foreclosure Action—Order for Sale—Conduct of Sale—Security for Costs of Sale—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 25.] An action having been brought to foreclose an equitable mortgage, the Plaintiff at the hearing asked for a sale. The Defendants did not oppose this, but they wished to have the conduct of the sale. The parties left it to the Judge to decide who should have the conduct:—*Held*, that the Defendants ought to have the conduct, because it was most to their interest to obtain the best possible price for the property.—*Held*, also, that, inasmuch as the Defendants alone would be liable for the costs of the sale, there was no reason for requiring them to give security for the costs.—*Woolley* v. *Colman* (21 Ch. D. 169) not followed as to such security.—Ordered, that the sale should take place out of Court, and that the proceeds of sale should be paid into Court. DAVIES *v.* WRIGHT - - - - 220

5. —— *Mortgagee in Possession—Receipt of Rents and Profits—Mortgage of two Estates—Sale of Part of one in Reduction of Debt—Claim of the Mortgagor of the other Estate.*] The fact that mortgagees are in receipt of the rents and profits of the mortgaged estate does not necessarily make them chargeable as mortgagees in possession. The question whether they are mortgagees in possession depends upon whether they have taken out of the mortgagor's hands the power and duty of managing the estate and dealing with the tenants.—B. was the agent of a mortgagor, and received the rents of the estate for him, and applied them in payment of the interest to the mortgagees. The mortgagees wrote to B. inclosing notices to the tenants to pay the rents to them, which he was to serve on them if the mortgagor should attempt to interfere. B. replied promising to pay the rents to the mortgagees and not to the mortgagor. The notices were not served on the tenants, but B. paid the rents as he received them to the mortgagees:—*Held* (reversing the decision of Pearson, J.), that the mortgagees could not be charged as mortgagees in possession.—A married woman having a charge on settled estates for her jointure joined with her husband in mortgaging them and another estate of which he was absolute owner. Afterwards the husband sold the unsettled estate, the mortgagees joining, and the purchase-money was paid partly in reduction of the mortgage debt and partly to the husband. The wife did not join in the conveyance, but consented to the transaction:—*Held* (affirming the decision of Pearson, J.), that whatever equity the wife might have against her husband or the estate which had been sold, she had no equity to charge the mortgagees with the sum paid to her husband. NOYES *v.* POLLOCK [C. A. 53

**MORTGAGE**—*continued.*

6. —— *Mortgagee in Possession—Practice—Surplus Rents—Receiver—Judicature Act*, 1873, *s.* 25, *sub-s.* 8.] Under sect. 25, sub-sect. 8, of the Judicature Act, 1873, a mortgagee in possession is entitled to the appointment of a receiver, notwithstanding that he has been paid all his interest and costs out of rents received by him while in possession, and that he has surplus rents in his hands. Mason *v.* Westoby - - 206

7. —— *Priority—Foreclosure—Fund partly in Court and partly in the Hands of Trustees—Notice—Stop Order—Costs—Plaintiffs first and last Mortgagees.*] When an assignment is made of an interest in a trust fund part of which is in Court and part in the hands of trustees, the assignee in order to complete his title must, as regards the fund in Court, obtain a stop order, and as regards the fund in the hands of trustees give notice to the trustees.—Decision of Pearson, J., affirmed.—An incumbrancer who obtains a stop order on a fund in Court does not lose his priority over a previous incumbrancer who has obtained no stop order, by the fact that he had notice of the previous incumbrance at the time of obtaining the stop order, if he had no notice of it when he took his security. —*Elder* v. *Maclean* (5 W. R. 447) observed upon. —A mortgagor was entitled to a reversionary interest in the residuary estate of a testator, and was also entitled to a life interest in certain sums of money under his own marriage settlement.—Before 1872 he mortgaged both his reversionary and life interests to divers persons. Notice of all these mortgages was given to the trustees of both funds before any notice of the next mentioned mortgage had been given. In 1872 he mortgaged his reversionary interest alone to the Defendant, who gave notice to the trustees of that fund. In 1876 and subsequent years the mortgagor made five subsequent mortgages of his life interest to the Plaintiffs, of which notice was given to the trustees of that fund. The Plaintiffs in 1880 took a transfer of the securities prior to the Defendant's mortgage of 1872.—The Defendant took two further charges on the reversionary interest, of neither of which did he give notice to the trustees thereof.—An action having been brought by the Plaintiffs for foreclosure of the reversionary and life interests:—*Held* (reversing the decision of Pearson, J.), that the Defendant on paying off the Plaintiffs' mortgages which were prior to his mortgage of 1872 was entitled to an assignment of both properties, although his mortgage included only one:—*Held*, that as regards the Defendant's two further charges on the reversionary property, and the Plaintiffs' five mortgages on the life interests, they must be redeemed in order of date respectively, notwithstanding the Plaintiffs' notices as to the life interests:—*Held*, also, that the Plaintiffs thus becoming the last mortgagees as well as the first must pay the costs of the suit if they did not redeem. Mutual Life Assurance Society *v.* Langley - - - - C. A. 460

8. —— *Priority—Trustee and Cestui que Trust—Solicitor and Client—Declaration of Trust—Evidence—Account Books—Letters—Mortgage—Fraud—Negligence—Purchase for Value without Notice.*] A client left moneys for investment in the hands of his solicitor. The solicitor represented that they were invested on a mortgage to A., and the client made no further inquiry. The solicitor, in fact, was the holder of a mortgage for a larger amount on property of A., as to part of which the legal estate was outstanding. He afterwards sold the property to a company:—*Held*, as to that part of the property in which the legal estate was outstanding, that there was no negligence to postpone the client, and that he had priority over the claim of the company.—H., who employed Messrs. P. as his solicitors, was in the habit of leaving moneys of his in their hands for investment for his benefit. In 1878, Messrs. P., who had lent money of their own to V. & E., an engineering firm, on a mortgage of their works at Cheltenham, repaid themselves £11,000, part of the debt, out of moneys of H. in their hands and in their books entered the transaction as a "loan" by H. to V. & E. of £11,000 at 5 per cent., the interest being paid to him during his life by Messrs. P.—In 1879 H. died intestate, and Messrs. P. then continued to act as solicitors to his administratrix. In 1881, V. & E. bought additional property at Cheltenham for their works, and executed a mortgage of that property in fee for £750, which mortgage subsequently became vested in the Worcester Bank. In 1882, D. became a partner in the firm of V. & E., D. purchasing and taking a conveyance of all the partnership property, and undertaking to pay the partnership debts. D. thereupon granted a lease of the property to the firm. Shortly afterwards D. mortgaged the property to Messrs. P. for £50,000 and interest, reserving power to create a charge in priority to that mortgage. Under that power D. charged the property with £8000 in favour of the Worcester Bank, who thus became entitled to a prior charge for £8750 on the whole property. D. then retired from his partnership with V. & E., and in February, 1883, conveyed the equity of redemption in the property to Messrs. P.—In July, 1883, the firm of V. & E. was, through Messrs. P.'s instrumentality, converted into a limited company, and in December, 1883, the firm joined with Messrs P. in conveying the property and goodwill of the firm to the company, subject to the mortgage to the Worcester Bank, in consideration of paid-up shares allotted to Messrs. P., and to V. & E., who thus became substantially the only shareholders in the company. The legal estate was then outstanding in the bank as to that part of the property which was comprised in their mortgage for £750.—Early in 1884 Messrs. P. absconded, and in March, 1884, they were adjudicated bankrupts. Neither H. nor his administratrix had any knowledge of the transactions entered into by Messrs. P. In June, 1884, the company was ordered to be wound up. A summons was then taken out by H.'s administratrix, in the winding-up, claiming (1) that, subject to the bank's mortgage, she became, under "declarations of trust" by Messrs. P., sub-mortgagee for £11,000 and interest, or part owner to that extent, of the £50,000 mortgage to Messrs. P.; (2) priority over the company; and (3) that, subject to the bank's mortgage, the securities might be marshalled. Messrs. P. were not represented on the summons, but an order had been

**MORTGAGE**—*continued.*
made by Cave, J., in their bankruptcy, on the application of H.'s administratrix (the company not being a party), declaring that, as against the trustees in the bankruptcy, £11,000, part of the £50,000 mortgage, formed part of H.'s estate, and that the appplicant was entitled to stand as first mortgagee of the mortgaged premises for the £11,000.—As evidence in support of the summons the claimant relied on the above-mentioned entry in Messrs. P.'s books; on entries in a cash account furnished to her by them of half-yearly payments of interest on the £11,000; on a tabular statement of "mortgages" in the residuary account of H.'s estate prepared by them in 1880 on her behalf for the Legacy Duty Office, one of the items being expressed to be a mortgage on "V. & E.'s property at Cheltenham for £11,000 at 5 per cent."; and on a letter written in 1883 by Messrs. P. to her, containing a similar tabulated statement of "mortgages" forming part of H.'s estate: —*Held*, that, although the entries, &c., so relied on were not evidence as against third parties such as the company, yet as against Messrs. P. they established a declaration of trust of a mortgage for £11,000 and interest extending to all the property at Cheltenham belonging to V. & E. at the date of the letter of 1883, and not merely to their property as existing in 1878; that no negligence was to be imputed to H., or his administratrix, for not requiring from Messrs. P., their solicitors, proper evidence of the mortgage: and that the company had failed to make out any case of purchase for value without notice.—Order made according to summons. *In re* VERNON, EWENS, & Co. - - - - - - 165

9. —— *Redemption—Mortgage of Realty and Personalty—Redemption by Executor.*] Real and personal estate were mortgaged together. The mortgagor died leaving a will of personalty, but intestate as to real estate. It was not known who was the heir-at-law, and the mortgagee entered into possession. The executrix of the mortgagor claimed to redeem the whole of the mortgaged property, which claim was resisted by the mortgagee, who insisted that her only right was to redeem the mortgaged personalty on payment of a proportionate part of the mortgage debt. The executrix brought an action for redemption, and Bacon, V.C., made a decree for the usual accounts as against a mortgagee in possession, directing that on payment of what was found due the mortgagee should convey and assign the mortgaged properties, real and personal, to the Plaintiff, subject to such equity of redemption as might be subsisting therein in any other person or persons. The Defendant appealed:—*Held*, that this decree was right, for that the owner of the equity of redemption of one of two estates comprised in the same mortgage cannot insist on redeeming that estate separately, and cannot be compelled to redeem it separately, his right being to redeem the whole, subject to the equities of the other persons interested:—*Held*, that although the heir-at-law, if known, ought to have been a party, the Court would not delay making a decree until he was ascertained and made a party:—*Held*, that although a mortgagee in possession who voluntarily transfers his security is liable to account

**MORTGAGE**—*continued.*
for the subsequent rents, he is subject to no such continuing liability when he transfers by the direction of the Court in a redemption suit. HALL *v.* HEWARD - - - - C. A. 430

—— Action to enforce security—Claim under Covenant—Joinder - - - 635
*See* PRACTICE. 10.

—— Shares—Lien of company - - - 266
*See* COMPANY. 2.

**NAME AND ARMS CLAUSE**—Personal estate
*See* WILL. 2. [388

**NEGLIGENCE**—Mortgage—Priority - - 165
*See* MORTGAGE. 8.

**NOTICE**—Discharge - - - - - 366
*See* COMPANY. 7.

—— Dissolution—Refusal to sign - - 355
*See* PARTNERSHIP.

—— Sale under Settled Land Act - - 616
*See* SETTLED LAND ACT. 3.

**PARTNERSHIP**—*Dissolution by mutual Consent—Refusal to sign Notice for insertion in the Gazette—Action to compel Signature—Jurisdiction.*] The Court has jurisdiction to compel a retiring partner to sign a notice of dissolution for the *Gazette* in an action in which no other specified relief is claimed. HENDRY *v.* TURNER 355

—— Acceptance of bill of exchange by members of firm - - - - 447
*See* BILL OF EXCHANGE.

—— Estate of deceased partner—Summons for administration - - - 447
*See* BILL OF EXCHANGE.

—— Deceased partner—Costs of administration action - - - - 613
*See* PRACTICE. 3.

**PATENT**—*Sufficiency of Specification.*] A patent, dated as to its final specification May, 1880, claimed an electric lamp with a carbon filament for its illuminating conductor. The patentee took out a subsequent patent, dated as to its provisional specification December, 1879, for a method of making carbon filaments for electric lamps:—*Held*, that there had been no such want of disclosure as to avoid the first patent. EDISON AND SWAN ELECTRIC LIGHT COMPANY *v.* WOODHOUSE [520

**PENALTIES**—Proceedings to recover against company - - - - 503
*See* COMPANY. 5.

**PETITION**—Winding-up - - 373, 503
*See* COMPANY. 5, 6.

**PORTIONS**—Double portions - - 525
*See* SETTLEMENT. 3.

**POSSESSION**—Land taken by public body 147
*See* LANDS CLAUSES ACT.

**POWER**—*Appointment by Will—Death of Appointee before Testatrix—Appointment of Executor—Intention.*] A testatrix exercised a general power of appointment, and appointed an executor who was the sole trustee of the property:—*Held*, upon the construction of the will, that she had not made the property the subject of the power

**POWER**—*continued.*

her own for all purposes, and that the gift over in default of appointment took effect.—The appointment of an executor is not sufficient evidence of intention to make the property the subject of the power assets for all purposes. *In re* Thurston. Thurston *v.* Evans - - - - 508

2. —— *Appointment by Will by Wife during Coverture — General Disposition by Will, after Death of Husband, with Clause revoking all former Wills — Revocation of first Will.*] A married woman having in a settlement a special power of appointment by will over real estate executed a will during coverture in 1866 appointing the same. After the death of her husband she made three other wills. In the first and second she said: "I revoke all other wills," and in the third: "I . . . . hereby revoke all wills, codicils, and other testamentary dispositions heretofore made by me, and declare this to be my last will and testament," and then disposed of all her estate "including as well real estate as personal estate over which I have or shall have a general power of appointment," but she did not in any way exercise or affect to exercise the power in the settlement, nor did she refer to it, or to the property the subject of the power:—*Held*, that the testamentary appointment of 1866 was revoked. *In re* Kingdon. Wilkins *v.* Pryer - - 604

**POWER OF SALE**—Trust for sale—Conversion *See* Will. 1. [408

**PRACTICE**—*Administration Action — Certificate of Chief Clerk—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 24, *sub-s.* 7—*Jurisdiction.*] The solicitor to the Plaintiff in a creditor's action bought up debts; the estate was insolvent:—*Held*, that the question whether the solicitor was trustee for the creditors of any profit on the purchase could not be raised by the certificate of the Chief Clerk, in the absence of any direction on the subject in the order under which the certificate was made. *In re* Tillett. Field *v.* Lydall - - - - - - 639

2. —— *Bankers' Books — Administration Action—Evidence — Solicitor's Accounts—Discovery —Bankers' Books Evidence Act*, 1879 (42 & 43 *Vict. c.* 11, *s.* 7.] The Plaintiff in an administration action was a residuary legatee of M., a solicitor, the testator in the action, and in the course of the cross-examination on the accounts, before the Chief Clerk, of the Defendant H., who was the testator's son-in-law and executor, and was carrying on business as a solicitor under the firm of "M. & H.," applied to the Court under sect. 7 of the Bankers' Books Evidence Act, 1879, that she, or her solicitor, who had been appointed receiver in the action, might be at liberty to inspect at the bankers of the testator and the Defendant the books of the bank for four years containing the entries of the accounts of the testator and also of M. & H., and to take copies of such entries. The Plaintiff's solicitor deposed that the inspection was necessary for the purposes of the action:—*Held*, that the Plaintiff was entitled to the order asked for. *In re* Marshfield. Marshfield *v.* Hutchings - - - 499

3. —— *Costs—Creditor's Administration Action by Separate Creditor—Joint and Separate*

**PRACTICE**—*continued.*

*Creditors—Estate solvent as to separate Debts only —Costs of Plaintiff as between Solicitor and Client.*] In an action by a separate creditor, on behalf of himself and all other the creditors of a testator, who was one of a firm of traders, for a general administration of the testator's estate, the general estate was realised, and turned out sufficient to pay in full the separate creditors, but insufficient to pay in full the joint creditors of the testator:—*Held*, that the Plaintiff was entitled to costs out of the estate as between solicitor and client. *In re* McRea. Norden *v.* McRea - - 613

4. —— *Costs — Higher and Lower Scale — Rules of Supreme Court*, 1883, *Order* lxv., *r.* 9.] An action for the establishment of a right of great pecuniary value, and involving difficult questions of fact and law, was heard at great length on five days before Bacon, V.C., who gave judgment in favour of the Plaintiff. The principal Defendant appealed. The appeal was argued on four days and judgment reserved. Ultimately, the decision was reserved, and the action dismissed with costs, Fry, L.J., dissenting.—*Held*, that, although the case was important and difficult, the Court could not say that there were special grounds arising out of its importance and difficulty which would warrant giving costs on the higher scale. Williamson *v.* North Staffordshire Railway Company - - - - C. A. 399

5. —— *Evidence—Cross-Examination of Affidavit Witness—Evidence on Inquiry after Trial—Rules of Supreme Court*; *Order* xxxvii., *rr.* 1, 5, 21, 22; *Order* xxxviii., *r.* 28.] On an inquiry added to a decree, A. filed an affidavit by a person resident in South America applying not only to the subject-matter of the inquiry, but to another matter as to which an inquiry had not been, but was afterwards, directed. The affidavit was read in Court on the first inquiry. When the second inquiry was being prosecuted A. gave notice to read the affidavit, upon which the opposite party gave a notice that he required to cross-examine the deponent, not saying when, where, or before whom:—*Held*, by Bacon, V.C., that the affidavit could not be read till the deponent had been produced for cross-examination.—*Held*, on appeal, that Order xxxviii., r. 28, excluding an affidavit from being read, except by special leave, unless the deponent is produced for cross-examination (supposing that Order xxxvii., rr. 21, 22, makes that rule applicable to evidence on an inquiry), did not exclude the present affidavit, as the notice did not comply with the rule, and that the rejection of the affidavit could not be sustained:—*Held*, further, that the Court under Order xxxvii., rr. 1, 5, could make such order for cross-examination as was requisite for the purposes of justice, but that under the special circumstances of the present case it would not direct that the witness should be cross-examined before his evidence was received, but would leave the opposite party at liberty to make within fourteen days any application he might be advised for cross-examination of the witness.—Whether Order xxxviii., r. 28, applies in the case of a witness who is resident out of the jurisdiction, *quære*. De Mora *v.* Concha - C. A. 133

6. —— *Evidence—Proof of Deed—Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125),

**PRACTICE**—*continued.*

*s.* 26.] An appointment of new trustees, not required to be by deed or to be attested, was made by deed, executed abroad by the donee of the power, who was resident abroad, and his execution of it was attested by a witness, also resident abroad. A vesting order was then applied for, one of the old trustees being of unsound mind, and was supported by proof of the handwriting of the signature of the appointor to the deed:—*Held*, that the petitioners must prove the handwriting of the attesting witness, or, failing that, must shew that they had endeavoured to find a witness in England who could speak to his handwriting, and failed in doing so, in which case the order might be drawn up on proof of the handwriting of the appointor. *In re* RICE (A PERSON OF UNSOUND MIND) - - C. A. 35

7. —— *Garnishee Order—Equitable Charge—Priority Notice—Rules of Supreme Court*, 1883, *Order XLV., r.* 1.] A garnishee order under rules of Supreme Court, 1883, Order XLV., binds only so much of the debt owing to a debtor from a third party as the debtor can honestly deal with at the time the garnishee order nisi was obtained and served; consequently it is postponed to a prior equitable assignment of the debt, even in the absence of notice. *In re* GENERAL HORTICULTURAL COMPANY. *Ex parte* WHITEHOUSE [512

8. —— *Interrogatories, Summons for Leave to deliver—Striking out—Irrelevancy—Chief Clerk—Jurisdiction—Rules of the Supreme Court*, 1883, *Order XXXI., rr.* 1, 3, 6, 7.] On the hearing of a summons before the Chief Clerk for leave to deliver interrogatories under Rules of the Supreme Court, 1883, Order XXXI., r. 1, he may consider the general relevancy or irrelevancy of the proposed interrogatories, and may, if a copy of the interrogatories is produced to him on the summons, strike out such as are irrelevant: but he is not at liberty to settle or amend, in the way of condensation, the form of any particular interrogatory that is in itself relevant. SWABEY *v.* DOVEY - - - - - - 352

9. —— *Interrogatories—Summons for Leave to deliver—Chief Clerk—Settling Interrogatories—Relevancy or irrelevancy—Jurisdiction—Rules of Supreme Court*, 1883, *Order XXXI., rr.* 1, 6, 7.] Upon an application for leave to exhibit interrogatories under Rules of Supreme Court, 1883, Order XXXI., rule 1, it is not necessary for the applicant, nor can he be required, to produce a copy of the proposed interrogatories: and if produced to the Chief Clerk on the hearing of the summons he has no right to settle them, or to decide upon the relevancy or irrelevancy of specific interrogatories and allow or disallow them accordingly. All that is necessary to support the summons is a statement by the applicant—not necessarily in writing—as to the general nature and scope of the proposed interrogatories, so as to enable the Court to decide whether he is entitled to the whole or any part of what he asks. —*Hall* v. *Liardet* (W. N. 1883, pp. 166, 194) approved of and followed. MARTIN *v.* SPICER [592

10. —— *Joinder of Claims—Mortgage—Action to enforce Mortgage Security—Claim for Account and Foreclosure or Sale—Claim for Sum due for Principal and Interest under Covenant in Mortgage Deed—Foreclosure Judgment Nisi—Rules of Supreme Court*, 1883, *Order III., r.* 6; *Order XIII., rr.* 3, 6, 7; *Order XV.*] A writ was indorsed with a claim for an account of principal, interest, and costs on a mortgage security, and for foreclosure or sale, and also with a claim for a specific sum for principal and interest due under a covenant in the mortgage deed.—The Defendant did not appear, and no statement of claim was delivered. —The Plaintiff moved, under Order XIII., rule 3, for liberty to forthwith sign final judgment for the amount indorsed on the writ, and under Order XV. for the usual foreclosure judgment nisi:—*Held*, that under Order XIII., rule 3, the Plaintiff was entitled to sign judgment for the liquidated demand notwithstanding that the writ was also indorsed with a claim for an account and foreclosure, but that he was not entitled under Order XV. to a foreclosure judgment.—Observations on *Blake* v. *Harvey* (29 Ch. D. 827). BISSETT *v.* JONES - - - - - - 635

11. —— *Service out of the Jurisdiction—Rules of Supreme Court*, 1883, *Orders XI.; LXVII., rr.* 5, 6; *LXXII., r.* 2—*Repeal of Act, qualified*—46 & 47 *Vict. c.* 49, *s.* 5.] *Held* (affirming the decision of Mr. Justice Chitty), that the Court cannot order service of an originating summons out of the jurisdiction.—Effect of a qualified repealing section considered. *In re* BUSFIELD. WHALEY *v.* BUSFIELD - - - C. A. 123

—— Injunction obtained by misrepresentation
*See* PUBLIC HEALTH ACT. [421

—— Lancaster Court - - - 403
*See* LANCASTER COURT.

—— Mortgage suit - - 194, 206, 220
*See* MORTGAGE. 2, 3, 6.

—— Originating summons - - - 447
*See* BILL OF EXCHANGE.

—— Service out of jurisdiction—Order in winding-up - - - - 348
*See* COMPANY. 8.

—— Specific performance - - - 192
*See* SPECIFIC PERFORMANCE.

**PRESCRIPTION**—Watercourse - - 549
*See* WATERCOURSE.

**PRINCIPAL AND AGENT**—Signature by agent—Memorandum of association - 337
*See* COMPANY. 3.

**PRIORITY**—Garnishee order—Equitable charge
*See* PRACTICE. 7. [512

—— Mortgage - - - 165, 460
*See* MORTGAGE. 7, 8.

**PRODUCTION OF DOCUMENTS**—Bankers' books
*See* PRACTICE. 2. [499

**PROHIBITION**—County Court - - 585
*See* FRIENDLY SOCIETY.

**PUBLIC HEALTH ACT** (38 & 39 *Vict. c.* 55), *s.* 32—"*Works for sewage purposes*"—*Ex parte Motion—Misrepresentation.*] The cleaning, levelling, and cementing the bottom of a pool, into which the effluent from sewage works flows:—*Held*, by the Court of Appeal (reversing the decision of North, J.), to be a work for sewage

**PUBLIC HEALTH ACT**—*continued.*
purposes within the meaning of sect. 32 of the Public Health Act, 1875.—*Held*, by North, J., that a motion to discharge an *ex parte* injunction on the ground of its having been obtained by misrepresentation, is proper, though the injunction is about to expire.—*Bolton* v. *London School Board* (7 Ch. D. 766) distinguished. Wimbledon Local Board *v.* Croydon Rural Sanitary Authority - - - - - C. A. 421

**PURCHASE WITHOUT NOTICE** - - 165
*See* Mortgage. 8.

—— Breach of trust - - - - 560
*See* Trustee. 2.

**RAILWAY COMPANY**—*Abandonment—Deposit—Compensation—Collateral Obligation—Covenant to build Station—Covenant to put up Fences.*] Where the Act incorporating a railway company contains a clause in the usual form that in case of the abandonment of the railway the parliamentary deposit shall be applicable towards compensating any landowners whose property may have been interfered with or rendered less valuable by the commencement, construction, or abandonment of the railway, a landowner can, as a general rule, only claim compensation on account of acts done or omitted to be done by the company under their statutory powers, and not on account of any collateral obligation entered into by the company.—But *held*, by Cotton and Lindley, L.JJ. (dissentiente Lopes, L.J.), that where a company has entered into a collateral obligation of such a nature that the breach of the obligation is necessarily involved in the abandonment of the railway and undistinguishable from it, such as a covenant to build a station, the breach of such obligation may be taken into account in assessing the diminution of value of the land.—*Held*, also, that a covenant to put up fences on the land taken by the company was not such an obligation as could form the subject of a claim for compensation out of the deposit. *In re* Ruthin and Cerrig-y-Druidion Railway Act [C. A. 438

—— Sale and reletting of wagons - 477
*See* Bill of Sale.

**REAL SECURITIES**—Investment - - 196
*See* Trustee. 3.

**RECEIVER**—Mortgage - 194, 206, 582
*See* Mortgage. 2, 3, 6.

**REDEMPTION** - - - - 430, 582
*See* Mortgage. 3, 9.

**REGISTRATION**—Bill of sale - - 477
*See* Bill of Sale.

—— Trade-mark - - 109, 213, 311, 347
*See* Trade-mark. 1—4.

**RELEVANCY**—Interrogatories - 352, 592
*See* Practice. 8, 9.

**RENTS AND PROFITS**—Receipt of 53, 194, 582
*See* Mortgage. 2, 3, 5.

**REPEAL OF STATUTE** - - - 133
*See* Practice. 5.

**RESCISSION**—Conditions of sale - - 14
*See* Vendor and Purchaser. 1.

**RESIDUARY LEGATEE**—Claim by mortgagee against - - - - 571
*See* Mortgage. 1.

**RESOLUTION**—Amalgamation of friendly societies—Jurisdiction of County Court 585
*See* Friendly Society.

**RESTRAINT ON ANTICIPATION**—Covenant to settle after-acquired property - 361
*See* Settlement. 1.

**RETAINER**—Right of - - - 395
*See* Executor.

**REVOCATION**—Appointment—Will - 604
*See* Power. 2.

—— Marriage settlement - - - 238
*See* Settlement. 2.

**ROYALTY**—Coal mine—Payment into Court 326
*See* Mine.

**RULES OF LANCASTER COURT, Order XXXIII. r. 21** - - - - - 403
*See* Lancaster Court.

**RULES OF SUPREME COURT, 1883, Order III., r. 6** - - - - - 635
*See* Practice. 10.

—— **Order XI.** - - - - 123
*See* Practice. 11.

—— **Order XIII., rr. 3, 6, 7** - - - 635
*See* Practice. 10.

—— **Order XV.** - - - - 635
*See* Practice. 10.

—— **Order XXXI., rr. 1, 3, 6, 7** - - 352
*See* Practice. 8.

—— ——, **rr. 1, 6, 7** - - - - 592
*See* Practice. 9.

—— **Order XXXVII., rr. 1. 5, 21, 22** - 133
*See* Practice. 5.

—— **Order XXXVIII., r. 28** - - 133
*See* Practice. 5.

—— **Order XLV., r. 1** - - - 512
*See* Practice. 7.

—— **Order LV., rr. 3, 10** - - - 447
*See* Bill of Exchange.

—— **Order LXV., r. 9** - - - 399
*See* Practice. 4.

—— **Order LXVII., rr. 5, 6** - - - 123
*See* Practice. 11.

—— **Order LXXII., r. 2** - - - 123
*See* Practice. 11.

**SALE**—Ineffectual—Costs—Taxation - 209
*See* Solicitor. 2.

—— Mortgage suit—Conduct of sale - 220
*See* Mortgage. 4.

—— One of two mortgaged estates—Equity of the other mortgagor - - - - 53
*See* Mortgage. 5.

—— Settled Land Act—Notice to trustees of settlement - - - - 616
*See* Settled Land Act. 3.

**SATISFACTION**—Portions - - - 525
*See* Settlement. 3.

**SECURITY FOR COSTS**—Conduct of sale - 220
*See* Mortgage. 4.

**SERVANT** — Wages — Winding-up of company *See* Company. 7. [366

**SERVICE**—Out of jurisdiction—Order in winding-up - - - - - 348
*See* Company. 8.

—— Out of jurisdiction - - - - 123
*See* Practice. 11.

**SETTLED LAND ACT**—*Application of Proceeds* —45 & 46 *Vict. c.* 38, *ss.* 21, *subs.* ii., 22, 37, 53 —*Heirlooms—Sale—Discharge of Incumbrances.*] The money arising by the sale, on the application of the tenant for life with the sanction of the Court, of chattels treated in a settlement as heirlooms, and so far as the rules of law and equity would permit annexed to the settled freehold land, may be applied in the discharge of incumbrances affecting the inheritance of the settled land, without keeping such incumbrances on foot for the benefit of the infant remainderman in whom the heirlooms would, if unsold, have vested absolutely on his attaining twenty-one.—Decision of Chitty, J., affirmed. *In re* Duke of Marlborough's Settlement. Duke of Marlborough *v.* Marjoribanks - - - - C. A. 1

2. —— *Costs—Proceedings for Protection of—Parliamentary Proceedings—Title of Dignity or Honour — Earldom—Incorporeal Hereditament— "Land."—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 10, *cl.* 1; *s.* 36.] Proceedings successfully prosecuted before the House of Lords Committee for Privileges to establish a claim to an Earldom, the consequences of which was that the Petitioner afterwards recovered estates which were subject to similar limitations, *held* to be "proceedings taken for the protection of settled land," the costs of which the Court directed to be paid out of property subject to the settlement, under sect. 36 of the Settled Land Act, 1882.—Form of order.—*In re Sir J. Rivett-Carnac's Will* (30 Ch. D. 136) considered. *In re* Earl of Aylesford's Settled Estates - - 162

3. —— *Notice to Trustees of Settlement—Contract by Tenant for Life to sell*—45 & 46 *Vict. c.* 68, *s.* 45.] On a sale by tenant for life under the Settled Land Act, 1882, a notice to the trustees given less than a month before the contract, but more than a month before the day fixed for completion, *held* a sufficient compliance with the 45th section:—*Semble*, a purchaser cannot avail himself of a defect in such notice as a defence to an action for specific performance. Duke of Marlborough *v.* Sartoris - - 616

4. —— 45 & 46 *Vict. c.* 38, *s.* 2, *sub-s.* 8; *s.* 37—*Trustee—Heirlooms.*] A trustee with power of sale subject to the consent of another is trustee for the purposes of the Settled Land Acts.—A trustee of a settlement with power of sale is trustee for the purposes of the Settled Land Acts, including the sale of heirlooms. Constable *v.* Constable - - - - - 233

**SETTLEMENT** — *After-acquired Property — Restraint on Anticipation.*] A restraint on anticipation is equivalent to a restraint on alienation, and accordingly the shares of married women in residuary real and personal estate given to them by will for their separate use without power of anticipation, are not bound by covenants for settlement of after-acquired property contained in their

**SETTLEMENT**—*continued.*

respective marriage settlements; and the capital of the personal estate is not payable to them on their separate receipt. *In re* Currey. Gibson *v.* Way - - - - - - 361

2. —— *Inchoate Marriage Settlement—Cancellation.*] In contemplation of marriage, an intended wife and her father executed the engrossment of a settlement of, inter alia, funds to be provided by the father, and the present and after-acquired property of the intended wife. The engrossment was given into the custody of the solicitors of the intended husband; it was not executed by him or the trustees. The engagement was broken off by agreement. After the lapse of three and a half years the Court declared the engrossment void as a settlement and directed it to be given up. Bond *v.* Walford - 238

3. —— *Satisfaction—Double Portions—Covenant to pay Annuity—Charge on Real Estate—Devise subject to Incumbrances.*] A father on the marriage of his second son, by deed of settlement covenanted to pay him an annuity of £1000 a year for life, and to charge the annuity on a sufficient part of the real estate he might die seised of; provided that nothing in the settlement should prevent his dealing with his real estate during his life, or, so only that sufficient real estate were left charged with the annuity, by will. The father subsequently made his will by which he devised his real estate (subject to the charges and incumbrances thereon) in strict settlement on his first and other sons in tail male; he bequeathed the greater part of his personal estate among his children, giving his second son legacies the income of which when invested would be considerably more than £1000 a year. He died leaving three sons:—*Held*, by Pearson, J., first, that the annuity was charged on the testator's real estate; and, secondly, that the presumption against double portions was rebutted, and the covenant to pay the annuity was not satisfied by the bequests to the second son.—On appeal,—*Held*, upon the first point, by Bowen and Fry, L.JJ. (Cotton, L.J., dissentiente), that the settlement operated not only as a covenant by the father, but also as a charge upon all the real estate of which he should die seised:—*Held*, upon the second point, by Cotton and Bowen, L.JJ. (Fry, L.J., dissentiente), that the words "subject to the charges and incumbrances thereon," were too general to rebut the presumption against double portions, and that the second son was not entitled both to the annuity and to the bequests under the will.—The doctrine of double portions discussed. Montagu *v.* Earl of Sandwich [C. A. 525

—— Post-nuptial - - - - 95
*See* Tenant in Tail.

**SEWAGE**—Works for sewage purposes - 421
*See* Public Health Act.

**SEWERS**—Commissioners of - - 72
*See* Commissioners of Sewers.

**SHARES**—Contract to take - - - 301
*See* Company. 1.

—— Lien of company - - - 266
*See* Company. 2.

**SHARES**—*continued.*
—— Sale of—Custom of Stock Exchange - 625
*See* STOCK EXCHANGE.

**SOLICITOR**—*Bill of Costs—Agent—Retainer—Costs.*] London solicitors acting for country solicitors, duly authorized, obtained an order for taxation of costs. The names of the London solicitors were indorsed on the petition for taxation as principals. The order for taxation was discharged on the motion of the client without costs. *In re* SCHOLES & SONS - - 245

2. —— *Bill of Costs—Attempted Ineffectual Sale by Trustees—Change of Trustees and of Solicitors—Taxation of Costs of Old Trustees—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44)—*General Order, r.* 2 (*c*); *Sched.* 1, *Pt.* 1, *r.* 2.] Schedule 1, Part 1, rule 2 of the General Order under the Solicitors' Remuneration Act, 1881 applies only to cases where the attempted ineffectual sale and the subsequent effectual sale therein mentioned are conducted by the same solicitors.—If there is a change of solicitors after an attempted ineffectual sale, the taxation of the costs of such sale must be made under General Order, rule 2 (*c.*) *In re* DEAN. WARD *v.* HOLMES - - - - - 209

3. —— *Bill of Costs—Taxation—Trustee in Bankruptcy—Bankruptcy—6 & 7 Vict. c. 73, ss.* 37, 38, 39.] The trustee in bankruptcy of a mortgagor held entitled to an order to tax, under 6 & 7 Vict. c. 73, the bill of costs of the solicitor of the mortgagee incurred in selling the property under a power of sale.—*In re Marsh* (15 Q. B. D. 340) distinguished. *In re* ALLINGHAM - C. A. 36

4. —— *Striking off Roll—Order for Payment against Solicitor as Solicitor—Default in Payment subsequent to Order striking off Roll—Order for Attachment—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 4, *sub-ss.* 3, 4.] Where a solicitor makes default in payment of a sum of money which he has been ordered to pay in the character of an officer of the Court, he is not the less liable to an order for an attachment because in the interval between the date of the order and the time fixed for payment he has been struck off the roll, and has ceased to be a solicitor.—Of the three possible periods for ascertaining whether the person ordered to pay and making default held the character of a solicitor, and was as such within the exception of sect. 4, sub-sect. 4, of the Debtors Act, 1869, viz.—(1) of the act done; (2) of the order made; or (3) of the default committed, that to be looked to is, if not the first, at the latest the second period.—In cases of trustee and person acting in a fiduciary capacity (sub-sect. 3) (and per Fry, L.J., in that of a solicitor also) the period to be looked to is that of the act done. *In re* STRONG - - - - - C. A. 342
—— Mortgage—Declaration of trust - 165
*See* MORTGAGE. 8.

**SPECIFIC PERFORMANCE**—*Practice—Order on Further Consideration—Defaulting Defendant—Four-day Order—Form of Order.*] Form of four-day order in an action by vendor for specific performance, where the Defendant has persistently endeavoured to evade both the judgment and the order on further consideration. MORGAN *v.* BRISCO [192

**SPECIFICATION**—Patent—Sufficiency - 520
*See* PATENT.

**STATION**—Covenant to build—Abandonment of railway - - - - 438
*See* RAILWAY COMPANY.

**STATUTES**:—
27 Eliz. c. 4—*Fraudulent Conveyances* - 95
*See* TENANT IN TAIL.
57 Geo. 3, c. xxix.—*City of London* - 72
*See* COMMISSIONERS OF SEWERS.
11 Geo. 4 & Will. 4, c. 65—*Settled Estates* 221
*See* TRUSTEE ACTS. 2.
2 & 3 Will. 4, c. 71—*Prescription* - 549
*See* WATERCOURSE.
3 & 4 Will. 4, c. 74, ss. 40, 41, 47, 50, 53—*Fines and Recoveries* - - - 95
*See* TENANT IN TAIL.
6 & 7 Vict. c. 73, ss. 37, 38, 39—*Solicitors* 36
*See* SOLICITOR. 3.
8 & 9 Vict. c. 18, ss. 76, 85—*Lands Clauses* 147
*See* LANDS CLAUSES ACT.
8 & 9 Vict. c. 20, ss. 3, 97—*Railways Clauses*
*See* BILL OF SALE. [477
11 & 12 Vict. c. clxiii., s. 120—*City of London*
*See* COMMISSIONERS OF SEWERS. [72
13 & 14 Vict. c. 60, ss. 2—*Trustee Act* 221, 641
*See* TRUSTEE ACTS. 2.
—— —— ss. 2, 29, 30 - - - 333
*See* TRUSTEE ACTS. 3.
—— —— ss. 32, 34 - - - 225
*See* TRUSTEE ACTS. 1.
15 & 16 Vict. c. 55, s. 3—*Trustee Extension Act*
*See* TRUSTEE ACTS. 2. [221, 641
16 & 17 Vict. c. 137, ss. 17, 62—*Charitable Trusts* - - - - - 154
*See* CHARITY. 1.
17 & 18 Vict. c. 125, s. 26—*Common Law Procedure* - - - - 35
*See* PRACTICE. 6.
25 & 26 Vict. c. 89, ss. 6, 11—*Companies* 337
*See* COMPANY. 3
—— —— s. 85 - - - - 503
*See* COMPANY. 5.
—— —— s. 133, sub-s. 1 - - - 41
*See* COMPANY. 4.
—— —— s. 170 - - - - 348
*See* COMPANY. 8.
32 & 33 Vict. c. 62, s. 4, sub-ss. 3, 4—*Debtors*
*See* SOLICITOR. 4. [342
36 & 37 Vict. c. 66, s. 24, sub-s. 7—*Judicature Act* - - - - - 639
*See* PRACTICE. 1.
—— —— s. 25, sub-s. 8 - - - 206
*See* MORTGAGE. 6.
37 & 38 Vict. c. 78, s. 9—*Vendors and Purchasers* - - - - 454
*See* VENDOR AND PURCHASER. 2.
38 & 39 Vict. c. 55, s. 32—*Public Health* 421
*See* PUBLIC HEALTH ACT.
38 & 39 Vict. c. 60, ss. 22, 24, sub-s. 8, 25, sub-s. 7, 30 sub-s. 10—*Friendly Societies*
*See* FRIENDLY SOCIETY. [585
—— —— ss. 1, 2, 5, 6, 9, 10—*Trade-marks Registration* - - - 311
*See* TRADE-MARK. 2.

**STATUTES**—*continued.*
38 & 39 Vict. c. 91, ss. 3, 5, 10 - - 247
*See* TRADE-MARK. 4.
42 & 43 Vict. c. 11, s. 7—*Bankers' Books Evidence* - - - - 499
*See* PRACTICE. 2.
44 & 45 Vict. c. 41, s. 25—*Conveyancing and Law of Property* - - - 220
*See* MORTGAGE. 4.
44 & 45 Vict. c. 44—*Solicitors' Remuneration*
*See* SOLICITOR. 2. [209
45 & 46 Vict. c. 38, s. 2, sub-s. 8; s. 37—*Settled Land Act* - - - - 233
*See* SETTLED LAND ACT. 4.
—— —— s. 2, subs. 10, cl. 1; s. 36 - 162
*See* SETTLED LAND ACT. 2.
—— —— s. 21, sub-s. ii., 22, 37, 53 - 1
*See* SETTLED LAND ACT. 1.
—— —— s. 45 - - - - 616
*See* SETTLED LAND ACT. 3.
45 & 46 Vict. c. 43, s. 9—*Bills of Sale* - 477
*See* BILL OF SALE.
46 & 47 Vict. c. 49, s. 5—*Statute Law Revision*
*See* PRACTICE. 11. [123
46 & 47 Vict. c. 57, ss. 64, 74—*Patents, Designs, and Trade-marks* - - - 311
*See* TRADE-MARK. 2.
—— —— ss. 64, 65, 72 - - - 109
*See* TRADE-MARK. 3.
—— —— ss. 70, 78 - - - 213
*See* TRADE-MARK. 1.

**STOCK EXCHANGE**—*Sale of Shares—Principal and Agent—Custom of Stock Exchange—Indemnity.*] A. having instructed his brokers, B. & Co., to purchase shares in the O. Bank, received from them a bought-note stating the purchase of shares from C. (a jobber), but, according to the usual practice on the Stock Exchange, not specifying the registered numbers of the purchased shares.—Between the date of purchase and the settling-day the bank stopped payment and proceedings were taken to wind it up. A.'s solicitors thereupon wrote to B. & Co. repudiating the contract for purchase contained in the bought-note, on the ground that the contract was illegal and void, being in contravention of 30 Vict. c. 29, and giving notice that if they completed it it would be at their own risk. On the same day A. wrote a private letter to B. calling attention to the formal letter, "and I wish you clearly to understand that whatever position you may have to assume with regard to them (the shares) I consider myself fully bound to support you."—The name of A., as the purchaser of the shares, was returned to C. by B. & Co., and on receiving a transfer and the share certificates the money was paid by them to the transferor's brokers. A. refused to execute the transfer, and returned it to B. & Co., in whose possession it remained, without, for some time, any intimation to the vendor that A. repudiated the transaction:—*Held*, that as the liability of C. (the jobber) in respect of the shares had ceased on the acceptance of the transfer by B. & Co. (*Coles* v. *Bristowe* (Law Rep. 4 Ch. 3)); it followed

**STOCK EXCHANGE**—*continued.*

that A., though he had not executed the transfer, had in the circumstances, and by not definitely repudiating the authority given to B. & Co. as his agents, become equitable owner of the shares, and bound to indemnify the vendor against all loss and liability in respect of them. LORING *v.* DAVIS [625

**STOP ORDER**—Priority—Fund partly in Court
*See* MORTGAGE. 7. [460
**STRIKING OFF ROLL**—Solicitor - - 342
*See* SOLICITOR. 4.
**STRIKING OUT INTERROGATORIES** - 352
*See* PRACTICE. 8.
**SUMMONS**—Administration - - 447
*See* BILL OF EXCHANGE.
—— Criminal—Penalties against company 503
*See* COMPANY. 5.
—— Vendor and Purchaser Act - - 454
*See* VENDOR AND PURCHASER. 2.

**TAXATION**—Bill of costs - - 36, 133, 209
*See* SOLICITOR. 1, 2, 3,

**TENANT IN TAIL**—*Disentailing Assurance of Copyholds—Declaration of Trust—Non-entry on Court Rolls—Settlement of Copyholds—Covenant to surrender—Post-nuptial Settlement—Consideration as between Husband and Wife—Interchange of Estates—Children of the Marriage—Volunteers—Fines and Recoveries Act* (3 & 4 *Will.* 4, *c.* 74), *ss.* 40, 41, 47, 50, 53—27 *Eliz. c.* 4.] A feme coverte entitled to an equitable estate tail in copyholds at B. executed, in February, 1870, a deed declaring that such copyholds should be held in trust for such persons as she and her husband should jointly appoint, and in default for herself in fee. The deed was duly acknowledged but was not entered upon the Court rolls of the manor within six months after execution.—By a deed of settlement dated in March, 1870, she and her husband, purporting to exercise this joint power, appointed the copyholds at B., and also covenanted to surrender those and other copyholds to which she was entitled in fee, to trustees upon trust to sell, invest the proceeds, and hold the fund (in the events which happened) for her for her separate use for life, then for her husband for life, and then for her children other than her eldest son.—No sale or surrender of any of the copyholds was ever made. The feme coverte had several children, and after the deaths of her and her husband the trustee of the settlement petitioned that all the copyholds might vest in him for all the estate therein of the eldest son and customary heir, who was an infant, and Hall, V.C., made a vesting order according to the prayer of the petition:—*Held*, first, that the deed of February, 1870, being a mere declaration of trust by the tenant in tail, and not a "disposition" within the Fines and Recoveries Act, was inoperative as an assurance to bar the estate tail in the copyholds at B.:—*Held*, secondly, in concurrence with *Honywood* v. *Foster* (30 Beav. 1) and *Gibbons* v. *Snape* (1 D. J. & S. 621), and upon the construction of the statute, that, taking sect. 41, together with sects. 50 and 53 of the Fines and Recoveries Act, a disentailing assurance

**TENANT IN TAIL**—*continued.*
by an equitable tenant in tail of copyholds, which is not entered upon the Court rolls of the manor within six months after execution, is void; and consequently that the power of appointment which the deed of February, 1870, purported to create could not be exercised:—*Held*, thirdly, that the settlement of March, 1870, was not a disposition by the feme coverte within the Act, and could not be treated either as an assignment of her equitable interest in the copyholds or as a valid declaration of trust, or as anything more than a mere covenant to surrender:—*Held*, fourthly, that the petition for a vesting order must be treated as an action by the persons interested under the settlement to enforce the covenant therein contained for the surrender and settlement of the copyholds, and that although the interchange of estates between the husband and wife imported a valuable consideration as between them, the settlement being post-nuptial was voluntary as regarded the children of the marriage, who were strangers to the contract, and consequently that the Court would not interfere in their favour, and the order appealed from must be discharged. Green *v.* Paterson - - - - - C. A. 95

**TITLE OF DIGNITY** - - - - 233
*See* Settled Land Act. 4.

**TOLLS**—Railway—Lien - - - - 477
*See* Bill of Sale.

**TRADE-MARK**—*Registration by Agent in his own Name—Assignment—Goodwill—Rectification of Register—Patents, Designs, and Trade-marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 70, 78.] M. and R., carrying on business as co-partners in New York, instructed their agents in this country, B. and W., to register two trade-marks for goods of theirs, of which B. and W. had the exclusive sale. Such trade-marks were registered by B. and W. as to one in the name of their firm, and as to the other in the name of W. only.—B. and W., having no beneficial ownership in the trade-marks, in August, 1884, assigned them to M. and R.—In December, 1884, one of the partners in the firm of M. & R, retired, and by deed assigned all his interest in the business of the firm and in the trade-marks to the continuing partners.—In December, 1885, another partner retired, and three new partners joined the firm, but no assignment was executed by the retiring partner.—On a motion by the present partners in the firm of M. & R., and the last retiring partner, under sect. 78 of the Patents, Designs, and Trade-marks Act, 1883, that proper notices of the assignments of August, 1884, and December, 1884, might be entered on the register, and that the persons entitled under the last-mentioned assignment might be entered as the present proprietors of the trade-marks:—*Held*, that the application might be granted, as the trade-marks had been transmitted in connection with the goodwill of the business of M. & R. within the meaning of sect. 70 of the Act. *In re* Wellcome's Trade-mark. *In re* Burroughs, Wellcome & Co.'s Trade-mark 213

2. —— *Registration — New Trade-mark — Absence of User prior to Application to register—Words common to Trade—Disclaimer of—Trade-marks Registration Act*, 1875 (38 & 39 *Vict. c.* 91), *ss.* 1, 2, 5, 6, 9, 10—*Patents, Designs, and Trade-marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 64, 74.] H. applied on the 28th of December, 1883, to register as a trade-mark a label surrounded by a pattern of ornamental design, and containing in the centre a rectangular black space, bearing the words "Hudson's Carbolic Acid Soap Powder," in white letters. On the outside of the rectangular space were other words descriptive of the purposes and advantages to be derived from the use of the Soap Powder. This label had not been used before the application:—*Held*, that the application must be treated as being made under the Act of 1875, and the Court could not enforce, as a term of registration, disclaimer of the words "Carbolic Acid Soap Powder," which were common to the trade and merely descriptive—that Act having no provision similar to that contained in sect. 74 of the Act of 1883:—That the label was a distinctive label and capable of registration as a trade-mark under the Act of 1875, but that only the label as a whole could be claimed as a trade-mark, and that no right could be acquired by such registration to the exclusive use of those common words, however long might be the user of them:—That whether under the Act of 1875 or of 1883, the fact of there having been no previous user did not prevent the registration—the Act of 1875 having effected a change in the law previously existing by making the mere act of registration, as regards any of the particulars specified in sect. 10, equivalent to the public user which before that Act was the essence of a trade-mark. *In re* Hudson's Trade-marks [C. A. 311

3. —— *Registration — Similarity—Old Mark applied to New Class of Goods—Patents, Designs, and Trade-marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 64, 65, 72.] L. had used from 1864, in respect of goods included in class 13, a trade-mark consisting of the head of Minerva, down to and including the shoulders, the head bearing a helmet with ringlets hanging down behind. In 1884, being about to extend his business to class 12, he applied to register for that class the same head with the word "Athena" under it. This application was opposed by B., who had used from 1869 a cutler's mark consisting of a head with the word "way" under it. The head had a sort of wig upon it, with small curls behind, and included the neck and part of the shoulders. In 1884 B. registered this mark under the Act of 1883 as an old cutler's mark, but the design actually registered departed from the old mark which he used, the head on the register being an uncovered head with a few sparse hairs upon it, and taking in only a small portion of the neck and no part of the shoulders:—*Held*, by Pearson, J., on the authority of *In re Worthington & Co.'s Trade-mark* (14 Ch. D. 8), that L.'s mark so resembled that of B. as to be calculated to deceive, and that it could not be registered.—*Held*, by the Court of Appeal, that the question whether a new mark is so like another as to be calculated to deceive is to be decided by considering whether the new mark is so like the other that when both are fairly used one is likely to be mistaken for the other, regard being had to size, the material on which the mark

**TRADE-MARK**—*continued.*

is to be impressed, the effects of wear and tear, and other surrounding circumstances; that L.'s mark was to be compared with the mark B. had put on the register, not with the mark which he had used; and that B., whose evidence was directed to a comparison between L.'s mark and the mark which B. had used, which was much more like L.'s mark than B.'s registered mark was, had not made out that the new mark was calculated to deceive. *In re* LYNDON'S TRADE-MARK [C. A. 109

4. —— *Registration*—"*Special and distinctive word*"—*Trade Marks Registration Act*, 1875 (38 & 39 *Vict. c.* 91), *ss.* 3, 5, 10—*Rectification of Register.*] A "special and distinctive word" used in the definition of a trade-mark in sect. 10 of the Trade Marks Registration Act, 1875, means a word which distinguishes the goods to which it is attached as goods made or sold by the owner of the mark; and by using some additional words so as to induce the general public, as distinguished from persons in the secrets of the particular trade who would not be deceived, to believe that goods so marked are of foreign brand and manufacture, the inventor of the original word is precluded from saying that such word is distinctive of his own manufacture so as to be capable of registration as his trade-mark.—In 1876, A. registered as his trade-mark the word "Eton," which had been used since 1869 and become known in the trade as denoting cigarettes of his manufacture. He had also been in the habit of selling, and supplying for the purposes of sale, "Eton" cigarettes in boxes so labelled (in conformity with an alleged custom in the trade) as to imply that such cigarettes were manufactured at St. Petersburg by a Russian firm;—*Held* (reversing the decision of Pearson, J.), that A., by so acting in connection with the word "Eton" as to suggest to persons not in the trade that the cigarettes were not of his making, had destroyed the value of the word as "special and distinctive" within the Trade-marks Act, 1875, s. 10, and accordingly that at the time of registration it had ceased to be his special and distinctive mark capable of registration. And as five years on the register does not (on the authorities) give an indefeasible title to a mark which, from not properly constituting a trade-mark within the meaning of the Act, ought not to have been registered, A.'s action to restrain an infringement of the mark by B. was dismissed, and rectification of the register by removing the mark on B.'s application allowed. *In re* WOOD'S TRADE-MARK. WOOD *v.* LAMBERT & BUTLER - - - C. A. 247

**TRUST**—Declaration of - - - 165
*See* MORTGAGE. 8.

**TRUST FUND**—Right to follow - - 560
*See* TRUSTEE. 2.

**TRUSTEE**—*Breach of Trust—Bankrupt Trustee entitled to Equitable Interest—Mistake of Law—Bankruptcy.*] A testator devised real estate to his nine children nominatim as tenants in common, giving a power to three of them to sell the whole to avoid the difficulties of partition. W., one of the three, conducted certain sales under the power, retained more than his share of the purchase-moneys, and went into liquidation. Further sales were effected, and out of the proceeds a further sum was paid to W.'s trustee in liquidation in respect of, and in excess of, his share:—*Held*, that all purchase-moneys received by the trustees were impressed with a trust under the will, and that W.'s equitable interest therein was liable to recoup the other beneficiaries; and this being so, that the payment to his trustee in liquidation was made in mistake of law, and (in analogy to the decisions in Bankruptcy of *Ex parte James* (Law Rep. 9 Ch. 609) and *Ex parte Simmonds* (16 Q. B. D. 308)) must be refunded by such trustee. *In re* BROWN. DIXON *v.* BROWN 597

2. —— *Breach of Trust — Fraud of one Trustee—Following Trust Fund—Innocent Trustee—Transferee of Stock—Purchaser for Value without Notice.*] C., trustee with the Plaintiff of a will, and also trustee with the Defendant of a settlement, having misappropriated a portion of the settlement fund, applied an equal portion of the will fund in the purchase of stock, which he transferred into the names of himself and the Defendant. The Plaintiff and Defendant were both innocent of C.'s fraud, and the Defendant and the cestuis que trust under the settlement had no notice that the stock was purchased with part of the will fund, C. died insolvent. In an action by the Plaintiff to compel the Defendant to transfer the stock to him:—*Held*, by the Court of Appeal (affirming the judgment of Bacon, V.C.), that the Defendant having by accepting the transfer of the stock given up his right to sue C. for his debt to the trust, was entitled to be treated as a purchaser for value without notice, and consequently to retain the stock as part of the settlement fund. TAYLOR *v.* BLAKELOCK C. A. 560

3. —— *Investment*—"*Real Securities*"—*Mortgage — Trade Premises — Brickfield — Houses—Valuation—Breach of Trust.*] A power for trustees to invest on "real securities" does not authorize an investment on freehold property—such as brickworks—dependent for its value upon a trade or business carried on thereon.—*Re Pearson* (51 L. T. (N.S.) 692) not followed.—Trustees who have invested trust funds upon mortgage of house property are not liable for loss through subsequent depreciation of the security arising from change of fashion or other circumstances incidental to house property, provided the trustees took care, in making the investment, to act upon due inquiry and a proper valuation and report made by an independent surveyor. *In re* WHITELEY. WHITELEY *v.* LEAROYD - - - - 196

—— Appointment of - - 221, 225, 641
*See* TRUSTEE ACTS. 1, 2.

—— Costs—Taxation - - - 209
*See* SOLICITOR. 2.

—— Infant—Vesting order - - 221, 641
*See* TRUSTEE ACTS. 2.

—— Lunatic's real estate—Trustee Act - 333
*See* TRUSTEE ACTS. 3.

—— Mortgage—Priority - - - 165
*See* MORTGAGE. 8.

—— Power of management—Repairs - 408
*See* WILL. 1.

**TRUSTEE**—*continued.*
—— Settled Land Act - - - 233
*See* Settled Land Act. 3.
**TRUSTEE IN BANKRUPTCY**—Taxation of solicitor's bill - - - - 36
*See* Solicitor. 3.

**TRUSTEE ACTS**—*Appointment of new Trustees—Appointment of existing Trustees in place of themselves and an absconding bankrupt Trustee—Trustee Act*, 1850 (13 & 14 *Vict. c.* 60), *ss.* 32, 34.] One of the four trustees of a settlement having been adjudicated a bankrupt and having absconded, an action was brought by one of the cestuis que trust against the other three trustees, claiming to have the trusts carried into execution, and to have it declared that the Defendants were bound to make good any loss which might accrue on three mortgages on which part of the trust funds had been invested, and which the Plaintiff alleged to be insufficient securities. He also alleged that the fourth trustee had acted fraudulently. The legal estate in the mortgaged properties was vested in all the four trustees, and the stocks, in which the remainder of the trust funds had been invested, stood in the names of the four trustees. Before issue was joined in the action the Defendants, in pursuance of an order of the Court, gave notice to call in two of the mortgages, and one of the notices had expired. Owing to the pendency of the action no one could be found willing to accept the trusts in place of the bankrupt:—*Held*, that under these circumstances, the Court could properly appoint the Defendants trustees in the place of themselves and the bankrupt.—An order was accordingly made appointing the Defendants, and vesting in them the mortgaged properties, and the right to sue for and receive the mortgage debts, and to call for a transfer of, and to transfer, the stocks into their own names, and to receive the dividends thereon, the Defendants to pay into Court the mortgage money when received. Davies *v.* Hodgson - - - - 225

2. —— *Vesting Order—Infant—Maintenance—Appointment of Guardian—Appointment of new Trustee—Legacy to Infant invested in sole Name of Infant—Declaring Infant Trustee—Trustee Act*, 1850 (13 & 14 *Vict. c.* 60), *s.* 2—*Trustee Extension Act*, 1852 (15 & 16 *Vict. c.* 55), *s.* 3—11 *Geo.* 4 & 1 *Will.* 4, *c.* 65.] Under the will of her father (a domiciled Scotchman, who made his will in the Scotch form), an infant was entitled to a legacy. The will contained no express trust for maintenance. The Court of Session in Scotland appointed a curator bonis to the infant, who received the legacy, and invested it in the purchase of some New Zealand stock, in the sole name of the infant. This stock was transferable at the Bank of England. It was the only property of the infant, and the income derived from it was not sufficient to provide for her maintenance and education. The Court of Session authorized the curator bonis to advance from time to time sums out of capital, not exceeding in all £100, for the purpose of supplementing the income of the infant, and enabling her to be placed at a suitable school.—The curator bonis, as next friend, presented a petition, asking that the right to transfer £100 of the New Zealand Stock might vest in

**TRUSTEE ACTS**—*continued.*
him, and that he might be at liberty to sell and transfer the same, and to apply the proceeds in or towards the maintenance or education of the infant; that the dividends which had accrued, and which might, during the minority of the infant, accrue on the stock, or on the residue thereof after the transfer, might be paid to him, he undertaking to apply them in or towards the maintenance or education of the infant; and that he might be appointed guardian:—*Held*, that the infant was a "trustee" of the stock, within the meaning of the Trustee Acts, and an order was made vesting the right to transfer £100 of the stock in the next friend (who was appointed guardian to the infant), and liberty was given to him to sell and transfer the same, and to apply the proceeds in or towards the maintenance or education of the infant; and that the dividends, accrued and to accrue during the minority of the infant, should be paid to the guardian, he undertaking to apply them in or towards her maintenance or education.—*Gardner* v. *Cowles* (3 Ch. D. 304) followed.—But this order, so far as it declared that the infant was a trustee of the stock and directed that the right to transfer the stock should vest in the guardian, was abandoned by the petitioners, and was not acted upon, the Bank of England having objected to its validity. *In re* Findlay (an Infant) - - - **221, 641**

3. —— *Vesting Order*—13 & 14 *Vict. c.* 60, *ss.* 2, 29, 30—*Vendor and Purchaser.*] By an order under the Lunacy Regulation Act, 1862, the guardians of the poor of N. were authorized to sell a freehold belonging to A. C., a person of unsound mind, and to receive the purchase-money and execute a conveyance. The property was sold in May, 1885, the sale to be completed in November. An abstract of title was delivered, and no objection was taken to the title. On the 28th of June A. C. died. The guardians now presented a petition asking that A. C. might be declared a trustee within the meaning of the Trustee Act, 1850, and that their clerk might be appointed a trustee of the property and the estate vested in him in trust to complete the sale:—*Held*, that A. C. could not be held a trustee within the meaning of the Trustee Act, 1850, and that the order could not be made.—*In re Carpenter* (Kay, 418) approved. *In re* Colling (a Person of Unsound Mind) - **C. A. 333**

**TRUSTEE ACT**—Proof of deed - - **35**
*See* Practice. 6.

**UNSOUND MIND**—Person of—Jurisdiction of Chancery Division - - - **39**
*See* Lunatic.
**USER**—Trade-mark—Application to register **311**
*See* Trade-mark. 2.

**VENDOR AND PURCHASER**—*Conditions of Sale—Particulars—Deficiency of Quantity—Specific Performance—Compensation—Right to rescind.*] Certain hereditaments were put up for sale in lots by auction subject to certain conditions of sale. The following conditions of sale were material: "3. Each lot is believed and shall be taken to be correctly described as to quantity and otherwise

**VENDOR AND PURCHASER**—*continued.*

. . . . and the respective purchasers . . . . shall be deemed to buy with full knowledge of the state and condition of the property as to repairs and otherwise, and no error, mis-statement, or mis-description shall annul the sale, nor shall any compensation be allowed in respect thereof. 6. Each purchaser shall send his objections and requisitions (if any) to or in respect of the title, and of all matters appearing upon the abstract or the particulars or conditions of sale, to . . . . the vendor's solicitors" within a limited time. "7. If any purchaser shall insist on any objection or requisition which the respective vendors shall be unable, or on the ground of expense or otherwise unwilling to answer, comply with, or remove, the respective vendors may . . . . at any time, and notwithstanding any intermediate or pending negotiations, proceedings, or litigation, annul the sale." Lot 3 consisted of buildings and land, and was stated in the particulars of sale to contain 4A. 3R. 37P., and to be let at annual rents amounting to £27. At the auction Lot 3 was sold, and a deposit was paid. The abstract of title having been delivered, the purchaser by his requisitions objected that Lot 3 was much smaller in extent than was stated in the particulars, the deficiency amounting to an acre and a half, and the true acreage being 3A. 1R. 37P. The mis-statement in the particulars of sale as to the acreage was inserted innocently, and the rentals of the property comprised in Lot 3 were correctly stated. The purchaser claimed that the contract should be carried out with compensation: the vendor refused any compensation, but offered to annul the sale. The purchaser having refused to withdraw his requisition or to consent to the annulment of the sale, the vendor gave notice that in pursuance of the seventh condition she annulled the sale. The purchaser having taken out a summons under the Vendor and Purchaser Act, 1874, for specific performance with compensation:—*Held*, that the vendor might lawfully annul the sale by virtue of the seventh condition, for the requisition as to the deficiency in the quantity was a requisition as to a matter appearing upon the particulars or conditions of sale within the meaning of the sixth condition.—By Lord Esher, M.R., and Lindley, L.J.:—That even without the sixth and seventh conditions, the purchaser would have been prevented by the third condition from obtaining specific performance with compensation. — By Lopes, L.J.:—That without the sixth and seventh conditions the purchaser would not have been prevented by the third condition from obtaining specific performance with compensation; for that condition applied only to trivial errors and not to a deficiency amounting to one-third in the quantity of the land purported to be sold.—*Whittemore* v. *Whittemore* (Law Rep. 8 Eq. 603) and *Cordingley* v. *Cheeseborough* (4 D. F. & J. 379) commented on. *In re* TERRY AND WHITE'S CONTRACT - - - - - C. A. 14

2. —— *Summons under Vendor and Purchaser Act—Return of Deposit—Interest—Costs of investigating Title—Vendor and Purchaser Act*, 1874 (37 & 38 *Vict. c.* 78), *s.* 9.] In exercising the summary jurisdiction given by the 9th section of the Vendor and Purchaser Act, 1874, the Court has power not only to answer the question submitted to it, but to direct such things to be done as are the natural consequence of the decision.—Therefore where the Court decided that the vendor had not shewn a good title or answered the requisitions, the Court ordered the vendor to return the deposit with interest at 4 per cent. from the day when it was paid, and to pay the purchaser's costs of the investigation of the title.—*In re Higgins & Hitchman's Contract* (21 Ch. D. 95) and *In re Yeilding & Westbrook* (31 Ch. D. 344) approved. *In re* HARGREAVES & THOMPSON'S CONTRACT - - - - - C. A. 454

—— Public undertaking—Possession - 147
*See* LANDS CLAUSES ACT.

**VESTING ORDER** - - 221, 333, 641
*See* TRUSTEE ACTS. 2, 3.

**VOLUNTARY CONTRIBUTIONS** - - 154
*See* CHARITY. 1.

**VOLUNTARY WINDING-UP** - - 41
*See* COMPANY. 4.

**VOLUNTEERS**—Post-nuptial settlement - 95
*See* TENANT IN TAIL.

**WAGONS**—Railway—Hiring agreement—Loan transaction - - - - 477
*See* BILL OF SALE.

**WATERCOURSE**—*Easement—Prescription—Artificial Watercourse—Landlord and Tenant—Enjoyment as of Right—Prescription Act* (2 & 3 *Wm.* 4, *c.* 71).] The Defendants in 1834 demised to the Plaintiffs the coal under the C. estate for fifty years, with powers to sink pits, make soughs, &c., erect engines, and make drains, &c., for supplying such engines with water, and also to do certain other acts on the surface for the better draining and working the demised mines and any other mines of which the Plaintiffs might become lessees under the lands of any other persons. In 1836 the Plaintiffs took a lease for thirty-five years of the O. Colliery from a neighbouring landowner. In 1846 the Plaintiffs made a drain about a mile long, chiefly on the C. estate, by which they diverted a small natural stream on the C. estate and brought it down to the O. Colliery, where they made reservoirs for the water at considerable expense. They did not ask leave to make the drain, but the defendants' agent saw the work going on and encouraged it. In 1872 the Plaintiffs became owners in fee of the O. Colliery. In 1884, when the lease from the Defendants expired, the Defendants stopped the drain and diverted the water. The Plaintiffs, claiming a right by prescription to the water, commenced this action to restrain them from doing so. The Vice-Chancellor of the County Palatine held that the watercourse was made under the powers of the lease and that the right to the water expired at the end of the lease, and he dismissed the action:—*Held*, on appeal, that this dismissal was right, for that if the making the drain was not authorized by the lease (as to which the Court gave no opinion) it was made and enjoyed, either under the belief of both parties that it was

**WATERCOURSE**—*continued.*

authorized by the lease, or under a comity between landlord and tenant, and that there was no enjoyment as of right so as to give the tenant a right to the water after the lease had expired. Chamber Colliery Company *v.* Hopwood [C. A. 549

**WILL**—*Disclaimer—Equitable Tenant for Life—Devise including incumbered and unincumbered Estates—Interest—Repairs—Power or Trust for Sale.*] A testatrix gave "all my real and personal estate" to trustees "upon trust at their discretion to sell all such parts thereof as shall not consist of money," and out of the produce to pay her debts and funeral and testamentary expenses, and invest the residue, "and shall stand possessed of such real and personal estate, moneys, and securities" upon trust "to pay the rents, interest, and dividends and annual produce thereof" to T. during her life, with a clause of forfeiture on alienation, and after the decease of T. the testatrix devised and bequeathed "my said real and personal estate and the securities on which the same may be invested unto and to the use of V. C., his heirs, executors, administrators, and assigns for ever, according to the nature and quality thereof respectively." At her death she was entitled in fee to the P. estate, which was unincumbered. Some time after her death a remainder in fee to which she was entitled in the B. estate, which was subject to mortgages made by prior owners and was out of repair, fell into possession, and its income was only sufficient to pay the interest on the mortgages. The trustees took out a summons for directions as to interest and repairs. The tenant for life contended that she could disclaim the B. estate, the remainderman contended that the rents of the P. estate were liable for the interest on the mortgages of the B. estate and for repairs of that estate. Vice-Chancellor Bacon held that the rents of the P. estate were not liable for either:—*Held*, on appeal, that the will did not create a trust for conversion, but only gave a power of sale; that no power of management and applying rents in repairs was conferred on the trustees; that T. as equitable tenant for life was not bound to repair; and that the rents of the P. estate could not be applied by the trustees in repairing the B. estate, though the Court, if applied to, could sanction the doing such repairs as were expedient on terms which would be equitable as between the tenant for life and the remainderman.—But *held*, that as the P. & B. estates were not specifically mentioned, but only formed parts of one gift in general terms, T. could not accept one and refuse the other.—*Guthrie* v. *Walrond* (22 Ch. D. 573) and *Syer* v. *Gladstone* (30 Ch. D. 614) distinguished.—*Held*, further, that under a trust of this nature the trustees had a discretionary power to apply, if expedient, the income of the unincumbered estate in paying such part of the interest on the mortgages as the rents of the mortgaged estate were insufficient to pay, but whether in case of their doing so there would not be equities to be adjusted between the tenant for life and the remainderman, *quære*. *In re* Hotchkys. Freke *v.* Calmady - C. A. 408

**WILL**—*continued.*

2. —— *Forfeiture—Name and Arms Clause—Validity—Effect of Disentailing Deed.*] A testatrix devised her real estate in strict settlement, the will containing an ordinary name and arms clause. And she bequeathed personal estate to trustees, in trust for the person or persons who for the time being should by virtue of the will be beneficially entitled to the real estate, for such or the like estates or interests, to the intent that the personal estate should go along with the real estate, so far as the nature of the personal estate and the rules of law and equity would permit. And the testatrix directed that the name and arms clause relating to the real estate should not affect the personal estate, but in lieu thereof she directed (inter alia) that if any person, being a male, who should be entitled under any of the limitations of the will to an absolute beneficial interest in possession by purchase in the personal estate should refuse or neglect to assume, use, and bear the name and arms of C. within the period therein mentioned, provided such period should expire within twenty-one years next after the death of the survivor of three persons named, or should, after having assumed the name and arms, discontinue to use and bear the same, or either of them, for six months at any time within the period of twenty-one years, then and in any of such cases, and from time to time, the estate and interest of the person so refusing, or neglecting, or discontinuing in the personal estate should absolutely cease, and the personal estate should from time to time go over to the person or persons who would have been entitled to the real estate under the limitations of the will in case the party whose estate should so cease, being tenant for life of the real estate, were dead, or, being tenant in tail of the real estate, were dead without issue, for such or the like estates or interests as such person or persons would have been entitled to in the real estate.—Within the proper time after the death of the testatrix the first tenant for life under the will assumed the name and arms of C., and continued to use them until his death. The Plaintiff was his first son and the first tenant in tail of the real estate under the will. After he had attained twenty-one he executed a disentailing deed of the real estate and limited it to himself in fee simple. He then claimed to be indefeasibly entitled in possession to the personal estate:—*Held*, that the forfeiture clause relating to the personal estate was valid, and that the effect of it was to make the interest of the tenant in tail, in case it should be forfeited, go over to the person who would have been entitled to the real estate under the limitations of the will in case the tenant in tail had been dead without issue, and no disentailing deed had been executed:—*Held*, therefore, that the Plaintiff was not indefeasibly entitled to the personal estate; but that his interest was liable to forfeiture in case within the period of twenty-one years he should discontinue to use the name and arms of C. *In re* Cornwallis. Cornwallis *v.* Wykeham-Martin - - - - - 388

3. —— *Mistake—Erroneous Statement of Fact—Advance to Legatee to be brought into Hotchpot*

**WILL**—*continued.*

—*Right of Legatee to adduce Evidence to contradict Will as to amount of Advance.*] A testator gave the proceeds of sale of his real and personal estate to trustees, on trust to divide the same among his children living at his death, and the issue of deceased children, in equal shares per stirpes. The will stated that the testator had advanced to four of his sons respectively certain specified amounts, on account of their respective shares, and the testator directed that the "respective sums hereinbefore recited to have been advanced" should be brought into hotchpot by the four sons respectively for the purposes of the division of his estate:—*Held*, that the sons were bound by the statement in the will of the amounts of the advances made to them, and were not entitled to adduce evidence to shew that the advances which had been made to them were in fact of less amount.—*In re Aird's Estate* (12 Ch. D. 291) followed.—The decision in that case is not overruled by *In re Taylor's Estate* (22 Ch. D. 495). *In re* WOOD. WARD *v.* WOOD - 517

—— Appointment by - - - 503, 604
*See* POWER. 1, 2.

**WINDING-UP.**
*See* Cases under COMPANY.

**WORDS**—"Special and distinctive word" - 247
*See* TRADE-MARK. 4.

—— "Tolls" - - - - - 477
*See* BILL OF SALE.

—— "Works for sewage purposes" - 421
*See* PUBLIC HEALTH ACT.

**WRIT**—Specially indorsed—Joinder - 635
*See* PRACTICE. 10.

LONDON:
PRINTED BY WILLIAM CLOWES AND SONS, LIMITED,
STAMFORD STREET AND CHARING CROSS.

UL 11 SEP 1959